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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

KURT JONES, Warden,
Petitioner,

vs.

OLIVER FRENCH, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

Deprivation of counsel occurs when a court or law *prevents* an accused from having representation. Lead counsel falsely represented that a member of the defense "team" was a lawyer, and failed to appear when directed for a discussion of a note from the jury, instead sending the individual falsely represented as an attorney. Did the state courts unreasonably apply settled federal principles as determined by this Court in concluding that review for prejudice, rather than automatic reversal, was the appropriate course?

II.

A "critical stage" of the trial is one of such significance that the presence of counsel is necessary to insure the adversary process is reliable. Determination whether a portion of the trial process was a "critical stage" thus requires reference to that which occurred. To determine that counsel was absent from a "critical stage" so that prejudice is conclusively presumed without looking to what occurred is to beg the question. Was counsel absent at a critical stage when the judge instructed the jury to "keep on talking"?

IN THE
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KURT JONES, Warden,
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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOW COMES the State of Michigan, by **MICHAEL E. DUGGAN**, *Prosecuting Attorney for the County of Wayne*, **TIMOTHY A. BAUGHMAN**, *Chief of Research, Training, and Appeals*, and **OLGA AGNELLO**, *Principal Attorney, Appeals*, and prays that a Writ of Certiorari again issue to review the judgment of the Sixth Circuit Court of Appeals of the United States of America, entered in this cause on June 11, 2003, rehearing denied August 14, 2003.

OPINIONS BELOW

The order of the Michigan Supreme Court denying leave to appeal is reported at 459 Mich 865, 584 NW2d 924 (1998). The opinion of the Michigan Court of Appeals is unreported, and is attached as Appendix D. The opinion of the District Court is reported at 114 FSupp2d 638 (ED Mich, 2000), and is attached as Appendix C. The first opinion of the Sixth Circuit affirming the District Court order granting the writ is reported at 282 F3d 893 (CA 6, 2002), and is attached as Appendix B. This Court's order granting certiorari and remanding the cause for reconsideration is reported at 535 US 1109 (2002). The second opinion of the Sixth Circuit after remand again affirming the District Court order granting the writ is reported at 332 F3d 430 (CA 6, 2003), and is attached as Appendix A.

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals issued its opinion on June 11, 2003 and denied rehearing *en banc* on August 14, 2003. This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

On May 3, 1995, the respondent here, Oliver French, was found guilty but mentally ill of one count of first degree premeditated murder, one count of second degree murder, two counts of assault with intent o commit murder and possession of a firearm during the commission of a felony, following a jury trial presided over by the Honorable Margie Braxton. On May 18, 1995, Judge Braxton sentenced the respondent to a term of life imprisonment without parole, concurrent sentences of fifteen to thirty years for the second degree murder and assault conviction and a consecutive two year term for the felony firearm conviction.

On July 15, 1997, the Michigan Court of Appeals affirmed the respondent's convictions. On October 9, 1997, the Michigan Court of Appeals denied the respondent's request for rehearing. On September 22, 1998, the Michigan Supreme Court denied the respondent leave to appeal.

On October 16, 1998, the respondent filed in the U. S. District Court a habeas corpus petition. On March 17, 1999, Judge Tarnow heard oral argument. On March 25, 1999, Judge Tarnow issued an Opinion and Order granting the writ.

This petitioner appealed Judge Tarnow's decision and the parties argued before the Sixth Circuit Court of Appeals. On July 18, 2000, that Court remanded the case to the district court for resolution of the question of whether Ty Jones was present and represented the respondent at the time the trial court reinstructed the jury. Judge Tarnow heard testimony on August 31st and September 7th, 2000. Judge Tarnow found that Jones was not an attorney despite lead counsel's representation to the trial court and jury that he was. Finding that the respondent had been without representation when the trial court reinstructed the jury, Judge Tarnow ruled that a Sixth Amendment violation amounting to structural error had occurred. On September 29, 2000, Judge Tarnow issued an Opinion and Order granting the petition for writ of habeas corpus.

On March 8, 2002, the Sixth Circuit Court of Appeals affirmed.

On June 3, 2002, this United States Supreme Court granted certiorari, vacated the judgment, and remanded the case to the Circuit Court for further consideration.

On June 11, 2003, the Sixth Circuit Court of Appeals again affirmed the district court's judgment; on August 14, 2003, it denied rehearing *en banc*. Petitioner seeks certiorari.

Facts of the Case

It was not disputed by the parties that Oliver French shot and killed Ronald McTasney and Gregory Couls or that he wounded William Bisbing and David Weitz at the Ford Rouge Plant where he was employed. The issue at trial was the sanity of the respondent at the time he committed the acts.

On the first day of trial, counsel of record, Cornelius Pitts and Monsey Wilson, seated themselves at the defense table with Ty Jones. The prosecutor, Augustus Hutting, asked who the third person was; Pitts responded that he was an attorney from California who specialized in jury selection. Hutting recommended that Pitts get clearance from the trial court to have Jones at the table. Pitts, Jones, and Hutting approached the bench and Pitts repeated to the trial court his introduction of Jones as an attorney from California, there to assist during the trial. After Pitt's representation, the trial court permitted Jones to remain at the defense table. During the course of jury selection, Mr. Pitts introduced Jones to the jury as counsel from California:

> MR. PITTS: May it please the Court. I am Cornelius Pitts, and I am aided in the representation of Mr. French with Mr. Monsey Wilson.
>
> MR. WILSON: Good afternoon.

> MR. PITTS: We likewise have one additional, a Mr. Ty Jones, who is indeed a counsel from California, who is aiding and assisting us temporarily here.

Jones was present every day of trial at the defense table and did address the trial court at the behest of lead counsel concerning an incident with a witness.

On April 27, 1995, after giving its instructions, the trial court asked the jury to retire to the jury room solely for the purpose of selecting its foreperson. Ten minutes later, the trial court excused the jury for the day. No deliberation occurred that day.

On Friday, April 28th at 9:00 a.m. the jury resumed deliberations. At 10:25 on Friday morning, the jury sent out a note requesting definitions, reports and transcript. The trial court, prosecutor and defense counsel (Wilson) discussed a response to the note and the trial court instructed the jury again from 10:56 a.m. to 11:15 a.m.. The jury sent out another note requesting copies of specific instructions which defense counsel (Wilson) and the prosecutor agreed the trial court should send into the jury room. At 3:25 p.m. the jury sent out another note to which the trial court did not immediately respond. Instead, the trial court excused the jury for the week-end.

On Monday, May 1, 1995, in the presence of defense counsel (Pitts) and the prosecutor, the trial court read the note sent out by the jury after only a few hours of deliberation at 2:58 on the previous Friday afternoon: "We can't reach a unanimous decision. Our minds are set." The trial court stated it would read the deadlocked jury instruction to which the prosecutor agreed. Defense counsel stated a mistrial would be appropriate. The trial court read to the jury the standard instruction at 9:30 a.m. After lunch the jury sent out another note. At 3:37 p.m. the jury was excused for the day.

On Tuesday, May 2, 1995, at 9:30 a.m., the trial court read the jury note for the record: "We have followed your instructions. We are still unable to reach a decision." The

trial court told the jury it would supply any exhibits requested and asked the jury to continue deliberations. The jury sent out another note at 11:00 a.m.: "We are not able to reach a verdict. We are not going to reach a verdict." The trial court did not immediately respond. Instead, it sent the jury to lunch and instructed the parties to appear at 2:00 p. m.. At 2:07 p.m. in the presence of the prosecutor and Ty Jones, the trial court told the jury the trial had been a lengthy one and it had been deliberating for only two days. The trial court reminded the jurors that they were expected to communicate with one another and exchange ideas in order to reach a verdict. At 3:30 p.m. the jury was excused for the day.

On Wednesday, May 3, 1995, Cornelius Pitts, defense counsel, requested a mistrial. Mr. Pitts conceded that four days (the jury had actually deliberated for three *short* days) was not an excessive period of deliberation for such a long trial, but argued the language of the three notes sent out by the jury indicated it could not agree. During the course of his argument, Mr. Pitts never mentioned that his client had been unrepresented when the trial court instructed the jurors to talk to one another. Mr. Pitts focused upon the language of the juror notes and finally made a request of the court:

> MR. PITTS: So I would respectfully ask the Court. We can do this. You can have the jury come out here. You can ask that Foreperson, listen, you have had these various notes at various times. Let me just ask you practically. I don't have any problem with it. You think sitting in there another half day is going to make things any different, or do you think coming back tomorrow is going to make a difference.

In the middle of the trial court's response, the jury returned a verdict.

At the evidentiary hearing presided over by Judge Tarnow, Ty Jones stated he was not an attorney and that he never told Cornelius Pitts that he was an attorney. Pitts

admitted that he introduced Jones as counsel from California because he wanted to convey the impression that it was a big team defending the petitioner.

REASONS FOR GRANTING THE WRIT

I.

Deprivation of counsel occurs when a court or law, state action, *prevents* an accused from having representation. Lead counsel falsely represented that a member of the defense "team" was a lawyer, and failed to appear when directed for a discussion of a note from the jury, instead sending the individual falsely represented as an attorney. The state courts did not unreasonably apply settled federal principles as determined by this Court in concluding that review for prejudice, rather than automatic reversal, was the appropriate course.

The Sixth Circuit Court of Appeals persists in finding in *United States v Cronic*[1] a rule of *per se* prejudice and automatic reversal.[2] And even after this Court's remand with instructions to apply *Bell v Cone*[3] (presumably because it contains a principle that should illuminate the way to a different resolution of this case), the Sixth Circuit's blinders

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[1] *United States v Cronic*, 466 US 648, 104 Sct 2039, 80 LEd2d 657 (1984).

[2] *Mitchell v Mason*, 325 F3d 732 (CA 6 2003), (petition for certiorari pending) regardless of *Bell v Cone*, 535 US 685 (2002), it presumed prejudice because trial counsel had been suspended from the bar for 30 days prior to trial; *Hunt v Mitchell*, 261 F3d 575 (CA 6 2001), presumed prejudice because counsel was appointed on the first day of trial even though there had been a ten-day continuance after presentation of the prosecution's first witness.

[3] *Bell v Cone*, 535 US 685, 122 Sct 1843, 152 LEd2d 914 (2002).

prevent it from seeing beyond its chosen path; it stubbornly clings to its course. The "rule" the Sixth Circuit has teased out of *Cronic* is not anchored in its facts or holding; it resides in a line of dicta.[4] By describing the naked principle as Supreme Court authority, the Sixth Circuit has relieved itself of the constraints of fact-bound holdings and, thus, paying false deference to the review standard of the AEDPA, it has freed itself of that limitation.

So, when the Sixth Circuit found that the Michigan appellate court was unreasonable in looking to the fact paradigm of *Rushen v Spain* [5] and applying harmless error analysis, it merely trumped with *Cronic*. It ignored *Williams v Taylor*, [6] the case that clarified the meaning of the operative clauses in §2254(d)(1). The *Williams* Court expressly limited the "clearly established Federal Law" phrase: "That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision."[7] But the Sixth Circuit found the holding of *Rushen v Spain*, permitting harmless error analysis in the circumstance of an ex parte communication by a trial court with a single juror, could not be extrapolated to the facts of this case – an ex parte communication by the trial court with all twelve jurors. The dictum of *Cronic* holds more charm

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[4] "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *Cronic*, 80 L Ed2d at 668.

[5] *Rushen v Spain*, 464 US 114, 104 SCt 453, 78 LEd2d 267 (1983).

[6] *Williams v Taylor*, 529 US 362, 120 SCt 1495, 146 LEd2d 389 (2000).

[7] 146 LEd2d at 429.

for the Sixth Circuit. This Court must stop what is becoming an annihilation of the concept of deprivation of counsel.

A. Deprivation of counsel

In the Michigan Court of Appeals, the respondent claimed he was denied his Sixth Amendment right to counsel because neither lead counsel, Cornelius Pitts, nor his second chair, Monsey Wilson, were present at the time the trial court responded to a jury note. Ty Jones, the person Pitts introduced as "counsel from California,"[8] did return at the appointed time and took his place at the defense table. Jones, unbeknownst to the trial court, was not an attorney at all. Despite the fact that the trial court did nothing to prevent trial counsel's presence and in fact did not know that Jones was not an attorney, the Sixth Circuit found the trial court's brief remarks to the jury was error justifying automatic reversal.

The Sixth Circuit's ruling that the "error" was structural is mistaken. "Structural error is an error affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."[9] The distinction between "structural error" and "trial error" is an important one because it determines how review should proceed; structural error renders an entire trial inherently unfair because prejudice is incapable of measure and, therefore, warrants automatic reversal, while trial error requires analysis to determine the extent of its impact in the circumstances – whether it was harmless. Sixth Amendment violations which amount to structural error include the *total deprivation* of the right to

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[8] Pitts testified at the district court evidentiary hearing that he introduced Jones to the trial court, prosecutor, and the jury as an attorney because he wanted to convey the impression that the respondent had a "team" working for him. R 68; 8/31/00, 33-34.

[9] *Arizona v Fulminante*, 499 US 279, 310, 111 SCt 1246, 113 LEd2d 302 (1991).

counsel;[10] a trial court's refusal to appoint separate counsel for a defendant sharing counsel with two co-defendants;[11] a trial court's order preventing a defendant from consulting with his attorney at all during a recess between his direct and cross-examination;[12] the trial court's refusal to allow counsel to be heard in summation of the evidence;[13] a statute requiring a defendant to testify before any other defense evidence was presented deprived the defendant of the advice of counsel in making the decision;[14] the denial of counsel at arraignment, the stage at which insanity must be pleaded or the defense forfeited;[15] the denial of counsel at a preliminary hearing where a plea was entered,[16] a statute permitting the admission only of the defendant's unsworn statement and the denial of the right to have counsel examine the defendant regarding it;[17] the refusal to appoint counsel before entry of the defendant's

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[10] *Gideon v Wainwright*, 372 US 335, 83 Sct 792, 9 LEd2d 799 (1963).

[11] *Holloway v Arkansas*, 435 US 80, 98 Sct 1173, 55 LED2d 42 (1976).

[12] *Geders v United States*, 425 US 80, 96 Sct 1330, 47 LED2d 592 (1976).

[13] *Herring v New York*, 422 US 853, 95 Sct 2550, 45 Led2d 593 (1975).

[14] *Brooks v Tennessee*, 406 US 605, 92 SCt 1891, 32 LEd2d 358 (1972).

[15] *Hamilton v State of Alabama*, 368 US 52, 82 SCt 157, 7 LEd2d 114 (1961).

[16] *White v Maryland*, 373 US 59, 83 SCt 1050, 10 LEd2d 193 (1963).

[17] *Ferguson v Georgia*, 365 US 570, 81 SCt 756, 5 LEd2d 783 (1961).

plea.[18] In all of these cases, this Court implicitly accepted common usage of the word "deprive"[19] and held that when a court or law, in other words, the government, keeps counsel from the accused, it amounts to a Sixth Amendment "deprivation." And in *Bell v Cone*,[20] this Court explicitly acknowledged that it is "government action" that triggered the automatic reversal rule – only when the *state* actually deprived a defendant of the advice or representation of counsel at a stage when it was necessary to the defense, did this Court find structural error which required automatic reversal.[21]

But the Sixth Circuit chose to ignore that portion of the *Cone* decision most relevant to analysis of this case. Instead of distinguishing the factors that constitute a "deprivation" of counsel, the court *concluded* that the absence of counsel – apparently, regardless of how it is effectuated – constituted a "deprivation."

The Sixth Circuit clings to its flawed rationale despite the fact that *Cronic* did not involve structural error. The language of *Cronic,* extracted by the Sixth Circuit to support its position – "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." – was not *Cronic's* holding. It was merely *dictum* offered by the

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[18] *Williams v Kaiser*, 323 US 471, 65 SCt 363, 89 Led 398 (1945).

[19] defined in Webster's Third New International Dictionary 606 (1965) as to take away, to remove, to keep from possession and enjoyment

[20] *Bell v Cone*, 122 SCt at 1851, fn 3.

[21] And Judge Seyla of the First Circuit got it right when he stated, "per se prejudice is hen's-teeth rare." *Gonzales-Gonzales v United States*, No. 02-1243, WL 31416029 (CA 1, 2002). Unpublished, Apx. E.

Court in its survey of Sixth Amendment law, explaining the continuum of the of analysis. That is not to say that the *dictum* is not an accurate statement of the law; it is, as it reflects the holdings of the *deprivation* cases. But it is not applicable to this case as this is not a case of *deprivation.* Because *Cronic* involves facts far removed from those of this case, *Williams* teaches that it cannot be the controlling precedent for resolution of the question presented here.

In addition to fabricating the dictum-based "rule" of *Cronic*, the Sixth Circuit failed to defer to the rationality of the Michigan courts' choice of governing Supreme Court principles. In the Michigan Court of Appeals, the respondent claimed he was denied his Sixth Amendment right to counsel because neither lead counsel, Cornelius Pitts, nor his second chair, Monsey Wilson, were present at the time the trial court responded to a jury note. But the Sixth Circuit refused to accept the rationality of the Michigan appellate court's choice of *Rushen v Spain,*[22] its fact paradigm and harmless error analysis, as the appropriate review standard for trial error; the one used by other circuits in similar circumstances.[23] Again, the automatic reversal required when structural error occurs was not appropriate here because there was not "deprivation" of counsel. It cannot be said that the trial court in any way took away, removed, or kept counsel from advising the respondent; there was no *state action* by act of a court, by rule, or by statute that impeded the respondent's access to counsel. Without such an act by the trial court, counsel's absence cannot be characterized as a *deprivation*; it does not fall within any of the fact paradigms of the Supreme Court cases that define a Sixth Amendment deprivation. But, as the Michigan Court of Appeals noted, the trial court's action does

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[22] *Rushen v Spain*, 464 US 114, 104 SCt 453, 78 LEd2d 267 (1983).

[23] *United States v Toliver*, No. 01-4469, WL 21279417 (CA 3, 2003).

resemble that of the trial court in *Rushen v Spain*, where the trial judge twice spoke to a juror about her concerns about evidence she had heard; the judge mollified her and told how to conduct herself. And neither defense counsel nor the prosecutor learned of these *ex parte* communications until after the trial.

The *Spain* Court found that the communication between the judge and juror was innocuous because they did not discuss any fact in controversy or any law applicable to the case. The Court held that the right to be present and to be represented by counsel during all critical stages of trial are subject to harmless error analysis.

Spain is a good fit for this case. The trial court in this case like the trial court in *Spain*, was not responsible for the fact that counsel was not present during its communication to the jury. That is, neither trial court prevented counsel's presence. In fact in this case, the trial court believed that Jones, who was sitting at the defense table, *was* an attorney and had been misled into so thinking by lead defense counsel. In this case, as in *Spain*, the trial court had an innocuous communication with the jury. The similarity of these cases is significant enough to warrant application of the same harmless error analysis. The Sixth Circuit was wrong in finding the Michigan Court of Appeals reliance on *Spain* to be unreasonable. Offering no analysis of the state appellate court's "perversity," the Sixth Circuit merely disagreed. *Bell v Cone* reiterates the *Williams* standard – to succeed the respondent must show that the State Court applied Supreme Court authority in an *unreasonable manner*.

But a second avenue of analysis is also available in this case – ineffective assistance of counsel. *Strickland v Washington*,[24] would provide a more logical analytical

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[24] *Strickland v Washington*, 466 US 668, 104 Sct 2052, 80 LEd2d 674 (1984).

framework for this case than *Cronic*; an ineffective assistance rather than deprivation analysis might be called forth by the facts of this case. Here, respondent's lead counsel, Pitts, had the audacity to lie to the court and jury in introducing Jones as an attorney, there to "help." This outrageous behavior and its consequence warrants evaluation as counsel's "mistake." And this "mistake" was compounded by Wilson's failure to return to the courtroom as directed. This defense performance was culpable, can easily satisfy the first prong of the ineffective assistance test. But did it prejudice the petitioner? Because the trial court's remarks to the jury were innocuous, not at all coercive, the communication was harmless. The respondent was not prejudiced, he should not prevail.

II.

A "critical stage" of the trial is one of such significance that the presence of counsel is necessary to insure the adversary process is reliable. Determination whether a portion of the trial process was a "critical stage" thus requires reference to that which occurred. To determine that counsel was absent from a "critical stage" so that prejudice is conclusively presumed without looking to what occurred is to beg the question. Counsel was not absent at a critical stage – the judge merely instructed the jury to "keep on talking."

The Sixth Circuit has found that the absence of counsel – or put another way, the presence of an individual the trial court was mislead by the defense to believe was an attorney for the respondent – when the jury was given an instruction in response to a note, required the setting aside of the conviction without any inquiry into prejudice because the proceeding was a "critical stage." This begs the question, for it is precisely that which occurred during any portion of the proceedings that determines whether that portion was a critical stage of the proceedings. The prejudice inquiry is inseparable, at least in many cases, from the question of whether a critical stage was involved when counsel was absent.

The point is illustrated by *United States v Russell*.[25] The defendant was one of 17 on trial. During trial his attorney collapsed in the lobby outside the courtroom, and was hospitalized. The trial continued, and the trial judge instructed the government that it was not to call any witnesses relevant to Russell until his attorney recovered and returned

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[25] *United States v Russell*, 205 F3d 768 (CA 5, 2000)

to the courtroom. Russell's counsel was absent from the trial for two days. Though no testimony directly implicating Russell was presented, eighteen witnesses, and a number of exhibits, were presented. Some of the evidence arguably incriminated Russell in the conspiracy indirectly.

The Fifth Circuit declined to adopt a bright line rule that the taking of any evidence in the absence of counsel is prejudicial *per se*, finding no such rule required by this Court's decision in *Cronic*. Rather, said the court, each case must be examined to determine whether the accused was denied counsel at a critical stage. Identifying critical stages the court found to be a difficult task, but identified several factors, set out in *Cronic*, especially that "there must be a denial of such significance that it makes the adversary process unreliable."[26] Because evidence was received that built the conspiracy case against all conspirators, thereby inferentially "increasing the taint of guilt" of Russell, the court found that counsel had been absent at a critical stage, and no further showing of prejudice was required.

Similarly, in *Olden v United States*[27] defendant's counsel was absent when evidence "probative of defendant's culpability" was received. The court found that the portions of the trial where counsel was absent were therefore "sufficiently critical to the ultimate question of guilt" to be critical stages, so that no further showing of prejudice was required.

On the other hand, in a case closely analogous to the present case, the Eleventh Circuit found that presuming prejudice was inappropriate. In *United States v Rapp*[28] the trial judge responded to a note from the jury without

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[26] 205 F3d at 771.

[27] *Olden v United States*, 224 F3d 561 (CA 6, 2000).

[28] *United States v Rapp*, 871 F2d 957 (CA 11, 1989).

consulting counsel and in their absence. The note indicated that the jury had reached a verdict against some defendant's but could not do so as to others, and requested guidance as to what to do. The judge assembled the jury in an anteroom, and gave a modified *Allen* charge in the absence of counsel. Citing *Rushen v Spain*[29] – the case relied upon by the petitioner in the present case, and cited by the Michigan Court of Appeals, but which the panel found "unreasonably applied" – the court examined whether the error of the court in so proceeding was harmless. The court found not, looking to the content of the instruction given by the trial judge.

The panel also noted that the situation was not unique, cataloguing cases where a trial court had answered substantive legal questions from the jury without counsel being present.[30] As the panel observed, "[N]one of the convictions was reversed...because each error was harmless." The court reached the same conclusion, stating that the fact that an *Allen* charge was involved was "not a factual difference that renders the communication prejudicial *per se*. Instead, some prejudice must be shown to have resulted from this error."[31] Finding no prejudice from the instruction – which, as in the present case, the court was able to review, since it was of record – the court affirmed.

Finally, in *Vines v United States*[32] the panel found that the absence of defendant's counsel when testimony was taken that was not incriminatory of the defendant was subject to a review for prejudice.

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[28] *Rushen v Spain*, 464 US 114, 104 S Ct 453, 78 L Ed 2d 267 (1983).

[29] See 871 F2d at 966-967.

[30] 871 F2d at 967.

[31] *Vines v United States*, 28 F3d 1123 (CA 11, 1994).

Rushen v Spain, cited by the Michigan Court of Appeals. is the appropriate template here. The panel's assertion that the contact between the judge and a juror in that case was "incidental" is remarkable – the judge met alone with a juror in chambers, and, in response to her concerns regarding contacts, told her how to compart herself, all in the absence of counsel. And this did not occur on the record, providing for easy review of what occurred. This Court found the hearing held post-trial sufficient to show that the communication was not prejudicial; yet, with a record of the instruction given here, the panel nonetheless insists that the state court erred – and not only erred, but acted *unreasonably* in erring, a conclusion reached with no analysis whatsoever – in reviewing for prejudice at all.

This Court should grant certiorari on this question, and hold that a review of what occurred during counsel's absence is part and parcel of determining whether counsel was absent during a critical stage – one "of such significance that it makes the adversary process unreliable."[33]

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[33] The panel, as an aside, also noted here that the trial judge's instruction allegedly "significantly deviated" from the model Michigan instruction, and therefore "likely" had a "substantial and injurious effect." The panel took no note of the fact that this question is one of state, and not federal law, and did not mention–even in passing–that the Michigan Court of Appeals made a specific finding to the contrary, finding the instruction not prejudicial under Michigan law. See Michigan Court of Appeals decision. Appendix B.

RELIEF

WHEREFORE, this Court should grant certiorari in this matter.

MICHAEL E. DUGGAN
Wayne County
Prosecuting Attorney

****TIMOTHY A. BAUGHMAN***
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1204 Frank Murphy Hall of Justice
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*Counsel of Record

APPENDIX A

On Remand from the United

States Supreme Court.

Decided and Filed: June 11, 2003

Before: COLE, Circuit Judge; GWIN, District Judge.(*)

COUNSEL

ON SUPPLEMENTAL BRIEF: Olga Agnello, OFFICE OF THE PROSECUTING ATTORNEY, Detroit, Michigan, for Appellant. David A. Moran, Detroit, Michigan, for Appellee.

OPINION

GWIN, District Judge. This case returns to us for a third time. Most recently, we affirmed the judgment of the district court. *French v. Jones,* 282 F.3d 893 (6th Cir. 2002). Thereafter, the United States Supreme Court granted respondent's petition for writ of certiorari, vacated our prior judgment, and remanded the case to our Court for further consideration in light of its decision in *Bell v. Cone*, 535 U.S. 685 (2002). *French v. Jones*, 535 U.S. 1109 (2002). Pursuant to the Supreme Court's order, the case is again before us for our determination.

With this appeal we examine whether the district court wrongly granted a writ of habeas corpus after a Michigan court gave a supplemental instruction to a deadlocked jury. The Michigan trial court gave the supplemental instruction, which did not conform with the approved Michigan instruction, when the defendant's attorney was not present.

At the first appeal to this Court. we vacated the district court's order granting habeas relief and remanded the case for an evidentiary hearing. At that hearing. the district court was directed to review the role of Ty Jones, an alleged attorney from California. Ty Jones was present at the time the supplemental instruction was given but it was unclear whether he was licensed to practice law. *French v. Jones*, No. 99-1436, 2000 WL 1033021, at *1-2 (6th Cir. July 18, 2000).

At the ensuing evidentiary hearing, the district court learned Jones was not an attorney and was present only to observe Cornelius Pitts, one of French's attorneys. After finding that Ty Jones was not an attorney, the district court held that French was denied representation during a critical stage of his trial and granted his petition for a writ of habeas corpus. *French v. Jones*, 114 F. Supp. 2d 638, 643 (E.D. Mich. 2000).

In our previous decision, we concluded that a defendant whose lawyer was not present when the trial judge gave a supplemental instruction to a deadlocked jury is entitled to habeas relief. After carefully reviewing the *Cone* decision, we see no reason to depart from our previous holding. Therefore, finding Petitioner French was denied counsel during a critical stage of his trial, we affirm the district court's grant of a writ of habeas corpus.

I.

On September 10, 1994, French shot four fellow union officials at the Ford Motor Company Rouge facility in Dearborn, Michigan. After trial to a jury,(1) French was found guilty but mentally ill(2) of one count of first-degree murder, Mich. Comp. Laws §§ 750.316, one count of second-degree murder, Mich. Comp. Laws §§ 750.317, two counts of assault with intent to commit murder, Mich. Comp. Laws §§ 750.83, and one count of possession of a firearm during the commission of a felony, Mich. Comp. Laws §§ 750.227b. The Michigan trial court sentenced French to life imprisonment

without parole for the first-degree murder conviction, fifteen to thirty years imprisonment for each of the second-degree murder and assault with intent to murder convictions, and two years consecutive imprisonment for the firearm conviction. At trial, two attorneys, Cornelius Pitts and Monsey Wilson, represented French. Ty Jones was also present at defense counsel's table for portions of the trial.

The confusion surrounding this case stems from representations made by Pitts and Wilson. At the beginning of the trial, Pitts introduced Jones to the prosecutor and trial judge as an attorney from California who specialized in jury selection. Pitts said Jones was present to assist with the trial. Based on Pitts's representation, the trial judge allowed Jones to remain at the defense table.

During jury selection, Pitts again introduced Jones as "counsel from California" who was assisting with the trial. Jones was present at the defense table every day of trial but never spoke in the presence of the jury.

At the evidentiary hearing held in this matter, the district court learned Jones was not a licensed attorney. While he had attended one year of law school at New York University, Jones worked as a motion picture consultant and screenwriter in Los Angeles. Jones observed the trial as background for the development of a television series based on the Detroit legal system.

At the evidentiary hearing, Pitts testified that Jones told him that he was a lawyer. Although Pitts did not intend for Jones to participate in the trial, Pitts said he introduced Jones as "counsel from California" to give the impression of a large defense team.

French's trial took more than two weeks before being submitted to the jury. After receiving instructions and choosing a foreperson, the jury recessed Thursday, April 27, 1995. The jury reconvened and began deliberating the

morning of Friday, April 28, 1995. During that day, the jury twice requested copies of trial materials. On both occasions, the prosecutor, Wilson, and the trial judge discussed the notes and sent the requested materials to the jury.

Late on Friday afternoon, the jury sent out a third note to which the trial judge did not immediately respond. Instead, the trial judge recessed the trial and excused the jury for the weekend.

On the morning of Monday, May 1, 1995, the trial judge read the note to Pitts and the prosecutor: "We can't reach a unanimous decision. Our minds are set." Pitts requested a mistrial, but the trial judge read the jury Michigan's standard deadlocked jury instruction. The jury continued to deliberate until late afternoon, when they sent out a second note. The second note also said the jury was unable to reach a decision. The trial judge again recessed the trial and excused the jury for the day.

At 9:30 a.m. on May 2, 1995, the trial judge again instructed the jury and directed them to continue deliberations. After continuing deliberations, the jury sent out a third note at 11:00 a.m.: "We are not able to reach a verdict. We are not going to reach a verdict." The trial judge responded by sending the jury to lunch and instructing the parties to appear at 2:00 p.m.

At 2:00 p.m., neither Pitts nor Wilson had returned to the courtroom. The trial judge asked Jones, who was present, to contact the two attorneys. Jones was unable to contact Pitts or Wilson. At 2:07 p.m., without Pitts or Wilson present, the trial judge brought the jury in and gave them a supplemental jury instruction. Unlike the first two instructions, the third instruction was not the standard deadlocked jury instruction.(3) The trial judge dismissed the jury for the day approximately one hour after giving the supplemental instruction.

The next morning, Pitts requested a mistrial because he felt the trial judge's supplemental instruction was coercive. While Pitts was arguing for a mistrial, the jury returned its verdict.

French moved the Michigan trial court to order a new trial, arguing he was prejudiced because his attorneys had not been present during the third supplemental jury instruction. The trial judge noted French's argument had some merit, but denied the motion for a new trial.

On July 15, 1997, the Michigan Court of Appeals affirmed the petitioner's convictions. The court held that the absence of defense counsel during a critical stage of the trial was subject to harmless error analysis. The court of appeals found the error harmless in French's case. On September 22, 1998, the Michigan Supreme Court denied the petitioner leave to appeal.

On October 16, 1998, the petitioner filed a petition in federal court for a writ of habeas corpus. On March 25, 1999, the district court granted the writ. As discussed above, the warden appealed, and we vacated the district court's decision and remanded for an evidentiary hearing.

After the evidentiary hearing and with a fully developed record before us, we reviewed the district court's decision to grant French's petition for a writ of habeas corpus. As grounds for the writ, French argued that the Michigan Court denied his constitutional right to the assistance of counsel when it supplemented its instruction to the jury when no attorney for French was present. We affirmed the judgment of the district court and held that French was denied counsel during a critical stage of his trial. The respondent petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court granted the petition and remanded the case to our Court for reconsideration in light of *Bell v. Cone*, 535 U.S. 685 (2002).

II.

Despite the Supreme Court's order vacating and remanding the case for our redetermination, our standard of review remains unchanged. We review a district court's grant of habeas relief de novo. *See, e.g., Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997).

In determining whether to issue a habeas writ, the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2241 *et seq.* ("AEDPA")(4) govern the district court's review of a state court decision. *Id.* The AEDPA only provides habeas relief for a state prisoner in certain circumstances:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §§ 2254(d) (2001).

The question of whether the trial judge deprived French of his right to counsel during the supplemental jury instruction is a mixed question of law and fact. *See Strickland v. Washington*, 466 U.S. 668, 698 (1984). In a habeas case, we apply the "unreasonable application" prong of §§ 2254(d)(1) to a mixed question of law and fact. *See* 28 U.S.C. §§ 2254(d)(1); *Harpster*, 128 F.3d at 326-27.

The recent Supreme Court decision of *Williams v. Taylor*, 529 U.S. 362 (2000), clarified the meaning of the operative clauses in §§2254(d)(1). *Williams* stated that federal courts are to find "clearly established Federal law" in the holdings of the Supreme Court, as opposed to its dicta, at the time of the relevant state court decision. *Williams*, 529 U.S. at 412; *see also Harris v. Stovall*, 212 F.3d 940, 944 (6th Cir. 2000).

The *Williams* Court then went on to clarify the situations in which a court could grant a writ of habeas corpus under §§ 2254(d)(1):

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13. Therefore, we look to see if the Michigan courts unreasonably applied a governing legal principle identified by the Supreme Court when they applied harmless error analysis to French's claim of deprivation of counsel during the supplemental instruction.

A.

Both parties agree that "the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice." *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000); *see also United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984). In our order remanding this case to the district court for an evidentiary hearing, we agreed with the district court that a supplemental jury instruction is a "critical

stage" of a criminal proceeding. *French*, 2000 WL 1033021, at *3 (citing *Rogers v. United States*, 422 U.S. 35 (1975), and *Shields v. United States*, 273 U.S. 583 (1927)); *see also Curtis v. Duval*, 124 F.3d 1, 4 (1st Cir. 1997). In our first decision in this matter, we noted that the Michigan courts conceded that the supplemental instruction was a critical stage of the trial. *See French*, 2000 WL 1033021, at *3 n.5. In light of our holding, we remanded the case to the district court to determine the exact nature of Jones's participation at the trial.

Once the evidentiary hearing established Jones was not an attorney, French argued that the Supreme Court has "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, 466 U.S. at 659 n.25. Since the supplemental jury instruction was a critical stage of the trial, French contended that reversal should be automatic. The district court agreed with French. Citing *Cronic*, the district court found a structural defect like the deprivation of counsel during a critical stage of the trial required automatic reversal. *See French*, 114 F. Supp. 2d at 642.

The Warden argues that the district court erred when it found French's lack of counsel during the supplemental instruction to be a structural error. Instead, the appellant says French's lack of counsel during the supplemental instruction was a trial error, subject to harmless error analysis.

In support of his position, the appellant says previous Supreme Court decisions indicate that an error during trial only requires automatic reversal when a defendant has suffered a total deprivation of counsel.(5) The appellant says the present case does not involve the complete deprivation of counsel because the trial court's actions did not prevent counsel from advising French. Without such an act by the trial court, the appellant says French's lack of counsel during the supplemental instruction is not a deprivation because it does

not fall within any of the fact paradigms the Supreme Court describes as deprivations under the Sixth Amendment.

As further support for its position that the district court erred, the appellant argues the district court's reliance on *Cronic* is misplaced. In *Cronic*, the Court reversed the court of appeals' inference that a defendant had received ineffective assistance of counsel because of the attorney's inexperience, limited access to witnesses, and short time to investigate and prepare for a complex trial. *Cronic*, 466 U.S. at 666. The Court remanded the case to consider whether specific alleged errors made by defense counsel were sufficient to support an ineffective assistance of counsel claim. *Id.* at 666-67. The appellant acknowledges *Cronic*'s statement in dicta that "[t]he presumption that counsel's assistance is essential requires [a court] to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial" is an accurate statement of law. *Id.* at 659. Because *Williams* instructs courts to only rely on the holding of cases when deciding clearly established federal law for habeas petition purposes, *Williams*, 529 U.S. at 412, the appellant argues the district court should not have relied on this statement of law because the language was not applicable to *Cronic*'s ultimate holding.

Instead, the appellant says the facts of this case resemble those in *Rushen v. Spain*, 464 U.S. 114 (1983). In *Rushen*, the Court applied harmless error analysis to a trial judge's ex parte communications with a juror about the juror's personal interaction with a police informant currently testifying before the juror. *Rushen*, 464 U.S. at 120-21. Neither defense counsel nor the prosecutor learned of the ex parte communications until after the trial.

The *Rushen* Court found that the post-trial hearing held on the matter provided sufficient evidence the communication between the judge and juror was innocuous and that no bias infected the jury's deliberations. *Id.* The appellant says the Court's use of harmless error analysis in *Rushen* supports his

assertion that we should analyze the present case for harmless error.

We disagree. Despite the appellant's attempt to characterize *Cronic*'s language as dicta, the Court has often held, both before and after *Cronic*, that absence of counsel during a critical stage of a trial is per se reversible error. Six years before *Cronic*, the Court held in *Holloway v. Arkansas*, 435 U.S. 475 (1978), that "when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic." *Holloway*, 435 U.S. at 489 (citing *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963), and *White v. Maryland*, 373 U.S. 59, 60 (1963)).

Four years after *Cronic*, the Court reiterated that harmless error analysis does not apply to Sixth Amendment claims involving the absence of counsel at a critical stage by stating that "the right to counsel is 'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" *Penson v. Ohio*, 488 U.S. 75, 88 (1988) (quoting *Chapman v. California*, 388 U.S. 18, 23 (1967)). As the Court most recently stated in a habeas case, "[t]he existence of [structural] defects-deprivation of the right to counsel, for example-requires automatic reversal of the conviction because they infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993).

Furthermore, the appellant wrongly characterizes *Rushen*. In *Rushen*, the Court did not say harmless error analysis applies to every occurrence of attorney absence at a critical stage of trial. Instead, the Court held that ex parte communications between a judge and juror should be analyzed for harmless error because "'it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.'" *Rushen*, 464 U.S. at 118-19 (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)).

The present case is vastly different from the incidental contact between a judge and juror at issue in *Rushen*. In this case, the trial judge delivered a supplemental instruction to a deadlocked jury. French's attorneys did not have an opportunity to respond to the jury's note nor were they present when the trial judge gave the supplemental instruction. The uncertainty of the prejudice French suffered because he was not represented by counsel during this critical stage of his trial makes the outcome of his trial unreliable. *See Roe*, 528 U.S. at 483; *Cronic*, 466 U.S. at 659 n.25.

Cronic correctly summarizes federal law when it states that absence of counsel during a critical stage of a trial amounts to constitutional error. *Cronic*, 466 U.S. at 659 n.25. In light of clear federal law, the Michigan courts unreasonably applied harmless error analysis to French's deprivation of counsel during the supplemental instruction. The district court properly granted the writ of habeas corpus.

The decision in *Cone* does not alter our analysis. In *Cone*, the Court defined the type of ineffective-assistance claims that fit within *Cronic's* second exception to the *Strickland* rule. *Cone*, 535 U.S. at 695-97. Under the *Strickland* rule, petitioners alleging a deprivation of their right to counsel must show (1) that counsel's performance fell below an objective standard of reasonableness and (2) that a reasonable probability exists that, but for counsel's substandard performance, the outcome would have been different. *Strickland*, 466 U.S. at 687. The *Cronic* Court held that the petitioner need not prove actual prejudice in the following three categories of circumstances: (1) when the petitioner was denied counsel at a critical stage of the proceedings; (2) when the petitioner's counsel "failed to subject the prosecution's case to meaningful adversarial testing"; and (3) when the circumstances of the trial prevent counsel from affording effective representation. *Cronic*, 466 U.S. at 656.

In *Cone*, the petitioner claimed his counsel had been ineffective when he failed to adduce mitigating evidence and waived final argument at the sentencing phase of the trial. *Cone*, 535 U.S. at 697. A panel of our Court below applied the second of *Cronic*'s three exceptions to the *Strickland* rule, holding that those failures were so egregious that they did not require a showing of actual prejudice. *See Cone v. Bell*, 243 F.3d 961, 979 (6th Cir.2001). The Supreme Court reversed that decision because the petitioner did not allege that trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, but alleged only that trial counsel failed at "specific points." *Cone*, 535 U.S. at 697. In reaching this conclusion, the Court announced that to apply the second *Cronic* exception, "the attorney's failure must be complete." *Id.*

French does not argue that his counsel failed to subject the prosecution's case to meaningful adversarial testing. Instead, he argues that the first *Cronic* exception applies because he says that he was completely denied counsel during a critical stage of a judicial proceeding. As discussed, *Cone* did not deal with a denial of counsel claim. Nor does the logic of *Bell's* holding that the attorney's failure must be complete extend to claims based on the denial of counsel at a critical stage of the proceedings. Therefore, we conclude that *Cone* does not apply to claims of denial of counsel during a critical stage.(6)

III. Conclusion

At the evidentiary hearing we ordered in this case, the district court determined French did not have counsel during the trial judge's supplemental jury instruction. Because French was without counsel during a critical stage of his trial, the district court correctly granted French's petition for a writ of habeas corpus. For the foregoing reasons, we AFFIRM the judgment of the Eastern District of Michigan.

Footnotes

*The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

[1] There was no dispute French committed the shootings. Instead, the issue at trial was French's mental state at the time of the shootings. At trial, French presented expert testimony and other evidence to show he was legally insane on the day of the shootings because an erroneously prescribed overdose of a powerful hypertension drug had combined with a pre-existing mental disorder to make him paranoid and psychotic. In response, the government presented expert testimony that French was legally sane on the day of the shootings.

[2] Michigan law allows a verdict of "guilty but mentally ill." *See* Mich Comp. Laws §§ 768.36. To return such a verdict, a jury must find the following beyond a reasonable doubt: (1) the defendant is guilty of an offense; (2) the defendant was mentally ill at the time of the offense; (3) the defendant was not legally insane at the time of the offense. *See* Mich Comp. Laws §§ 768.36(1). A person found guilty but mentally ill is sentenced the same as if he were simply found guilty of the offense. Mich. Comp. Laws §§ 768.36(3). The only difference between the two verdicts is that the department of corrections is responsible for evaluating the defendant and providing any required psychiatric treatment. *See id.*

[3] The relevant part of the trial judge's third instruction to the jury is as follows:

> THE COURT: Now, ladies and gentlemen, I must remind you that you did take an oath to render a true and just verdict. But if you are to be expected to render a verdict, you must communicate, and you must talk with each other.
>
> This case lasted how many days, Mr. Hutting? Approximately 16 days?

MR. HUTTING: Fourteen days trial. For jury selection -

THE COURT: All right. So it wouldn't be uncommon for deliberations to go on for sometime, and I might remind you that you began to deliberate I think Friday, and I don't knowhow you can come to the conclusion that you are not going to reach a verdict.

Based upon your oath that you would reach a true and just verdict, we expect you will communicate. As I stated before, exchange ideas. Give your views. Give your opinions and try to come to a verdict, if at all possible.

But if you don't communicate, you know that you can't reach a verdict. And when you took the oath, that was one of the promises that you made by raising your hand taking the oath, that you would deliberate upon a verdict, to try to reach a verdict. And we told you at the outset it would not be an easy task, but we know that you can rise to the occasion. So we'll ask that you return to the jury room.

Thank you.

(J.A. at 84-85).

[4] We decide this case under the AEDPA because French filed his petition for a writ of habeas corpus in October 1998, well after AEDPA's effective date of April 24, 1996. *See Barker v. Yukins*, 199 F.3d 867, 871 (6th Cir. 1999).

[5] The appellant says the following cases describe structural errors because they involve the total deprivation of counsel: *Geders v. United States*, 425 U.S. 80 (1976) (a trial court's order preventing a defendant from consulting with his attorney at all during a recess between his direct and cross-examination); *Herring v. New York*, 422 U.S. 853 (1975) (the

trial court's refusal to allow counsel to be heard in summation of the evidence); *Brooks v. Tennessee*, 406 U.S. 605 (1972) (a statute requiring a defendant to testify before any other defense evidence was presented deprived the defendant of the advice of counsel in making the decision); *White v. Maryland*, 373 U.S. 59 (1963) (the denial of counsel at a preliminary hearing where a plea was entered); *Gideon v Wainright*, 372 U.S. 335 (1963) (total deprivation of the right to counsel during trial); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (the denial of counsel at arraignment, the stage at which insanity must be pleaded or the defense forfeited); *Ferguson v. Georgia*, 365 U.S. 570 (1961) (a statute permitting the admission only of the defendant's unsworn statement and the denial of the right to have counsel examine the defendant regarding it); *Williams v. Kaiser*, 323 U.S. 471 (1945) (the refusal to appoint counsel before entry of the defendant's plea).

[6] We are not alone in this conclusion. The Eleventh Circuit recently noted in dicta that *Bell* does not apply to claims of denial of counsel at trial. *See Hunter v. Moore*, 304 F.3d 1066, 1070 n.4 (11th Cir. 2002). *Accord United States ex rel. Madej v. Schomig*, 223 F. Supp.2d 968, 971-72 n.2 (N.D. Ill. 2002) ("*Bell v. Cone* does not appear to alter the conditions for presuming prejudice under *Cronic* when a defendant is actually denied counsel at a critical stage of the proceedings or when the circumstances of the trial render effective assistance impossible.")

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2002 FED App. 0082P (6th Cir.)

File Name: 02a0082p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Oliver French, Jr.

Petitioner-Appellee,

v. No. 00-2308

Kurt Jones,

Respondent-Appellant.

Appeal from the United States District Court

for the Eastern District of Michigan at Detroit.

No. 98-74520--Arthur J. Tarnow, District Judge.

Argued: January 22, 2002

Decided and Filed: March 8, 2002

Before: JONES and COLE, Circuit Judges; GWIN, District Judge.(*

COUNSEL

ARGUED: Olga Agnello, OFFICE OF THE PROSECUTING ATTORNEY, COUNTY OF WAYNE, Detroit, Michigan, for Appellant. David A. Moran, STATE APPELLATE DEFENDER OFFICE, Detroit, Michigan, for Appellee. **ON BRIEF:** Olga Agnello, OFFICE OF THE PROSECUTING ATTORNEY, COUNTY OF WAYNE, Detroit, Michigan, for Appellant. David A. Moran, STATE APPELLATE DEFENDER OFFICE, Detroit, Michigan, for Appellee.

OPINION

GWIN, District Judge. This case returns to us for a second time. With this appeal we examine whether the district court wrongly granted a writ of habeas corpus after a Michigan court gave a supplemental instruction to a deadlocked jury. The Michigan trial judge gave the supplemental instruction, which did not conform with the approved Michigan instruction, when the defendant's attorney was not present.

At the earlier appeal to this Court, we vacated the district court's order granting habeas relief and remanded the case for an evidentiary hearing. At that hearing, the district court was directed to review the role of Ty Jones(1), an alleged attorney from California. Ty Jones was present at the time the supplemental instruction was given but it was unclear whether he was licensed to practice law. *French v. Jones*, No. 99-1436, 2000 WL 1033021, at *1-2 (6th Cir. July 18, 2000).

At the ensuing evidentiary hearing, the district court learned Jones was not an attorney and was present only to observe Cornelius Pitts, one of French's attorneys. After finding that Ty Jones was not an attorney, the district court held that

French was denied representation during a critical stage of his trial and granted his petition for a writ of habeas corpus. *French v. Jones*, 114 F. Supp. 2d 638, 643 (E.D. Mich. 2000).

With this appeal, we decide whether a defendant whose lawyer was not present when the trial judge gave a supplemental instruction to a deadlocked jury is entitled to habeas relief. Finding Petitioner French was denied counsel during a critical stage of his trial, we affirm the district court's grant of a writ of habeas corpus.

I.

On September 10, 1994, French shot four fellow union officials at the Ford Motor Company Rouge facility in Dearborn, Michigan. After trial to a jury,(2) French was found guilty but mentally ill(3) of one count of first-degree murder, Mich. Comp. Laws §§ 750.316, one count of second-degree murder, Mich. Comp. Laws §§ 750.317, two counts of assault with intent to commit murder, Mich. Comp. Laws §§ 750.83, and one count of possession of a firearm during the commission of a felony, Mich. Comp. Laws §§ 750.227b. The Michigan trial court sentenced French to life imprisonment without parole for the first-degree murder conviction, fifteen to thirty years imprison-ment for the each of the second-degree murder and assault with intent to murder convictions, and two years consecutive imprisonment for the firearm conviction. At trial, two attorneys, Cornelius Pitts and Monsey Wilson, represented French. Ty Jones was also present at defense counsel's table for portions of the trial.

The confusion surrounding this case stems from representations made by Pitts and Wilson. At the beginning of the trial, Pitts introduced Jones to the prosecutor and trial judge as an attorney from California who specialized in jury selection. Pitts said Jones was present to assist with the trial. Based on Pitts's representation, the trial judge allowed Jones to remain at the defense table.

During jury selection, Pitts introduced Jones as "counsel from California" who was assisting with the trial. Jones was present at the defense table every day of trial but never spoke in the presence of the jury.

At the evidentiary hearing held in this matter, the district court learned Jones was not a licensed attorney. While he had attended one year of law school at New York University, Jones worked as a motion picture consultant and screenwriter in Los Angeles. Jones observed the trial as background for the development of a television series based on the Detroit legal system.

At the evidentiary hearing, Pitts testified that Jones told him that he was a lawyer. Although Pitts did not intend for Jones to participate in the trial, Pitts said he introduced Jones as "counsel from California" to give the impression of a large defense team.

French's trial took more than two weeks before being submitted to the jury. After receiving their instructions and choosing a foreperson, the jury recessed on Thursday, April 27, 1995. The jury reconvened and began deliberating the morning of Friday, April 28, 1995. During that day, the jury twice requested copies of trial materials. On both occasions, the prosecutor, Wilson, and the trial judge discussed the notes and sent the requested materials to the jury.

Late on Friday afternoon, the jury sent out a third note to which the trial judge did not immediately respond. Instead, the trial judge recessed the trial and excused the jury for the weekend.

On the morning of Monday, May 1, 1995, the trial judge read the note to Pitts and the prosecutor: "We can't reach a unanimous decision. Our minds are set." Pitts requested a mistrial, but the trial judge read the jury Michigan's standard deadlocked jury instruction. The jury continued to deliberate until late afternoon, when they sent out a second note. The

second note also said the jury was unable to reach a decision. The trial judge again recessed the trial and excused the jury for the day.

At 9:30 a.m. on May 2, 1995, the trial judge again instructed the jury and directed them to continue deliberations. After continuing deliberations, the jury sent out a third note at 11:00 a.m.: "We are not able to reach a verdict. We are *not* going to reach a verdict." The trial judge responded by sending the jury to lunch and instructing the parties to appear at 2:00 p.m.

At 2:00 p.m., neither Pitts nor Wilson had returned to the courtroom. The trial judge asked Jones, who was present, to contact the two attorneys. Jones was unable to contact Pitts or Wilson. At 2:07 p.m., without Pitts or Wilson present, the trial judge brought the jury in and gave them a supplemental jury instruction. Unlike the first two instructions, the third instruction was not the standard deadlocked jury instruction.(4) The trial judge dismissed the jury for the day approximately one hour after giving the supplemental instruction.

The next morning, Pitts requested a mistrial because he felt the trial judge's supplemental instruction was coercive. While Pitts was arguing for a mistrial, the jury returned its verdict.

French moved the Michigan trial court to order a new trial, arguing he was prejudiced because his attorneys had not been present during the third supplemental jury instruction. The trial judge noted French's argument had some merit, but denied the motion for a new trial.

On July 15, 1997, the Michigan Court of Appeals affirmed the petitioner's convictions. The court held that the absence of defense counsel during a critical stage of the trial was subject to harmless error analysis. The court of appeals found the error harmless in French's case. On September 22, 1998, the Michigan Supreme Court denied the petitioner leave to appeal.

On October 16, 1998, the petitioner filed a petition in federal court for a writ of habeas corpus. On March 25, 1999, the district court granted the writ. As discussed above, the warden appealed, and we vacated the district court's decision and remanded for an evidentiary hearing.

Now, with a fully developed record before us, we review the district court's decision to grant French's petition for a writ of habeas corpus. As grounds for the writ, French argues that the Michigan trial judge denied his constitutional right to the assistance of counsel when it supplemented its instruction to the jury when neither of his attorneys were present.

II.

We review a district court's grant of habeas relief de novo. *See, e.g., Harpster v. Ohio,* 128 F.3d 322, 326 (6th Cir. 1997).

In determining whether to issue a habeas writ, the district court's review of a state court decision is governed by the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2241 et seq. ("AEDPA").(5) *Id.* The AEDPA only provides habeas relief for a state prisoner in certain circumstances:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §§ 2254(d) (2001).

The question of whether the trial judge deprived French of his right to counsel during the supplemental jury instruction is a mixed question of law and fact. *See Strickland v. Washington*, 466 U.S. 668, 698 (1984). In a habeas case, we apply the "unreasonable application" prong of §§ 2254(d)(1) to a mixed question of law and fact. *See* 28 U.S.C. §§ 2254(d)(1); *Harpster*, 128 F.3d at 326-27.

The recent Supreme Court decision of *Williams v. Taylor*, 529 U.S. 362 (2000), clarified the meaning of the operative clauses in §§2254(d)(1). *Williams* stated that federal courts are to find "clearly established Federal law" in the holdings of the Supreme Court, as opposed to its dicta, at the time of the relevant state court decision. *Williams*, 529 U.S. at 412; *see also Harris v. Stovall*, 212 F.3d 940, 944 (6th Cir. 2000).

Williams then went on to clarify the situations in which a court could grant a writ of habeas corpus under §§ 2254(d)(1):

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 529 U.S. at 412-13. Therefore, we look to see if the Michigan courts have unreasonably applied a governing legal

principle identified by the Supreme Court when they applied harmless error analysis to French's deprivation of counsel during the supplemental instruction.

A.

Both parties agree that "the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice." *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000); *see also United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984). In our order remanding this case to the district court for an evidentiary hearing, we agreed with the district court that a supplemental jury instruction is a "critical stage" of a criminal proceeding. *French*, 2000 WL 1033021, at *3 (citing *Rogers v. United States*, 422 U.S. 35 (1975), and *Shields v. United States*, 273 U.S. 583 (1927)); *see also Curtis v. Duval*, 124 F.3d 1, 4 (1st Cir. 1997). In our previous decision in this matter, we noted that the Michigan courts conceded that the supplemental instruction was a critical stage of the trial. *See French*, 2000 WL 1033021, at *3 n.5. In light of our holding, we remanded the case to determine the exact nature of Jones's participation at the trial.

Once the evidentiary hearing established Jones was not an attorney, French argued the Supreme Court has "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, 466 U.S. at 659 n.25. Since the supplemental jury instruction was a critical stage of the trial, French said reversal should be automatic. The district court agreed with French. Citing *Cronic*, the district court found a structural defect like the deprivation of counsel during a critical stage of the trial required automatic reversal. *See French*, 114 F. Supp. 2d at 642.

Michigan argues the district court erred when it found French's lack of counsel during the supplemental instruction to be a structural error. Instead, the appellant says French's

lack of counsel during the supplemental instruction was a trial error, subject to harmless error analysis.

In support of his position, the appellant says previous Supreme Court decisions indicate that an error during trial only requires automatic reversal when a defendant has suffered a total deprivation of counsel.(6) The appellant says the present case does not involve the complete deprivation of counsel because the trial court's actions did not prevent counsel from advising French. Without such an act by the trial court, the appellant says French's lack of counsel during the supplemental instruction is not a deprivation because it does not fall within any of the fact paradigms the Supreme Court describes as deprivations under the Sixth Amendment.

As further support for its position that the district court erred, the appellant argues the district court's reliance on *Cronic* is misplaced. In *Cronic*, the Court reversed the court of appeals' inference that a defendant had received ineffective assistance of counsel because of the attorney's inexperience, limited access to witnesses, and short time to investigate and prepare for a complex trial. *Cronic*, 466 U.S. at 666. The Court remanded the case to consider whether specific alleged errors made by defense counsel were sufficient to support an ineffective assistance of counsel claim. *Id.* at 666-67. The appellant acknowledges *Cronic*'s statement in dicta that "[t]he presumption that counsel's assistance is essential requires [a court] to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial" is an accurate statement of law. *Id.* at 659. Because *Williams* instructs courts to rely only on the holding of cases when deciding clearly established federal law for habeas petition purposes, *Williams*, 529 U.S. at 412, the appellant says the district court should not have relied on this statement of law because the language was not applicable to *Cronic*'s ultimate holding.

Instead, the appellant says the facts of this case resemble those in *Rushen v. Spain*, 464 U.S. 114 (1983). In *Rushen*, the

Court applied harmless error analysis to a trial judge's ex parte communications with a juror about the juror's personal interaction with a police informant currently testifying before the juror. *Rushen*, 464 U.S. at 120-21. Neither defense counsel nor the prosecutor learned of the ex parte communications until after the trial.

The *Rushen* Court found that the post-trial hearing held on the matter provided sufficient evidence the communication between the judge and juror was innocuous and that no bias infected the jury's deliberations. *Id.* The appellant says the Court's use of harmless analysis in *Rushen* supports his assertion that we should analyze the present case for harmless error.

We disagree. Despite the appellant's attempt to characterize *Cronic*'s language as dicta, the Court has often held, both before and after *Cronic*, that absence of counsel during a critical stage of a trial is per se reversible error. Six years before *Cronic*, the Court held in *Holloway v. Arkansas*, 435 U.S. 475 (1978), that "when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic." *Holloway*, 435 U.S. at 489 (citing *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963), and *White v. Maryland*, 373 U.S. 59, 60 (1963)). Four years after *Cronic*, the Court reiterated that harmless error analysis does not apply to Sixth Amendment claims involving the absence of counsel at a critical stage by stating that "the right to counsel is 'so basic to a fair trial that [its] infraction can never be treated as harmless error.'" *Penson v. Ohio*, 488 U.S. 75, 88 (1988) (quoting *Chapman v. California*, 388 U.S. 18, 23 (1967)). As the Court most recently stated in a habeas case, "[t]he existence of [structural] defects-deprivation of the right to counsel, for example-requires automatic reversal of the conviction because they infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993).

Furthermore, the appellant wrongly characterizes *Rushen*. In *Rushen*, the Court did not say harmless error analysis applies to every occurrence of attorney absence at a critical stage of trial. Instead, the Court held that ex parte communications between a judge and juror should be analyzed for harmless error because "'it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.'" *Rushen*, 464 U.S. at 118-19 (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)).

The present case is vastly different from the incidental contact between a judge and juror at issue in *Rushen*. In this case, the trial judge delivered a supplemental instruction to a deadlocked jury. French's attorneys did not have an opportunity to respond to the jury's note nor were they present when the trial judge gave the supplemental instruction. The uncertainty of the prejudice French suffered because he was not represented by counsel during this critical stage of his trial makes the outcome of his trial unreliable. *See Roe*, 528 U.S. at 483; *Cronic*, 466 U.S. at 659 n.25.

Cronic correctly summarizes federal law when it states that absence of counsel during a critical stage of a trial amounts to constitutional error. *Cronic*, 466 U.S. at 659 n.25. In light of clear federal law, the Michigan courts unreasonably applied harmless error analysis to French's deprivation of counsel during the supplemental instruction. The district court properly granted the writ of habeas corpus.

B.

We also note that the trial judge's supplemental instruction significantly deviated from the model Michigan instruction and likely had a substantial and injurious influence on the jury's verdict. *See Barker v. Yukins*, 199 F.3d 867, 872-73 (6th Cir. 1999) (holding the petitioner met §§ 2254(d)(1)'s "unreasonable application" standard by showing the trial court's failure to give a proper jury instruction had a

substantial and injurious effect on the jury's verdict). In *Sullivan v. People*, 392 Mich. 324, 220 N.W.2d 441 (1974), Michigan adopted the American Bar Association's ("ABA") standard jury instruction 5.4 for addressing a deadlocked jury. *Sullivan*, 392 Mich. at 341-42, 220 N.W.2d at 450.(7) Michigan adopted the ABA's standard instruction to minimize any coercive effect of jury instructions given pursuant to *Allen v. United States*, 164 U.S. 492 (1896). At the time of French's trial, ABA standard jury instruction 5.4 read:

> a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
>
> (i) that in order to return a verdict, each juror must agree thereto:
>
> (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (iii) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;
>
> (iv) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and
>
> (v) that no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in paragraph (a). The court

shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

People v. Pollick, 448 Mich. 376, 381-82, 531 N.W.2d 159, 162 (1995).

The trial judge's supplemental instruction did not remind jurors they should not give up their honest convictions solely because of the opinion of the other jurors or in order to reach a verdict. (J.A. at 84-85). Excluding this aspect of an *Allen* instruction increases its coercive effect. *See United States v. Burgos*, 55 F.3d 933, 939-40 (4th Cir. 1995); *Jiminez v. Myers*, 40 F.3d 976, 981 n.5 (9th Cir. 1993) ("A trial court's failure to give such a cautionary instruction weighs heavily in favor of the conclusion that the defendant's right to a fair trial and impartial jury has been violated."); *United States v. Scott*, 547 F.2d 334, 337 (6th Cir. 1977). The trial judge's omission of the "honest convictions" component is even more troubling because an appropriate charge was included in the first supplemental instruction given to the jury. (JA. at 80). Such an omission risks the jurors believing their responsibilities have changed.

Furthermore, the trial judge's omission of the "honest convictions" component was amplified by the trial judge telling the jurors three separate times they took an oath to reach a verdict. (J.A. at 84-85). While unintentional, the trial judge's instruction emphasized the jurors duty to reach a unanimous verdict without assuring them that dissent was acceptable. *See Burgos*, 55 F.3d at 940.

The time line of the jury's deliberation suggests that the third supplemental instruction had an effect. Once they received the case, the jury deliberated for three days. During that time, they

sent out three increasingly emphatic notes saying they were deadlocked and could not reach a verdict. Even though the trial judge twice gave them a standard deadlocked jury instruction the jury could still not reach a verdict. Yet, less than two hours after receiving the third supplemental instruction, the jurors returned a guilty but mentally ill verdict on all counts.

In light of these facts, we conclude the trial judge's third supplemental instruction had a substantial and injurious influence on the jury's verdict that resulted in prejudice to French.

III. Conclusion

At the evidentiary hearing we ordered in this case, the district court determined French did not have counsel during the trial judge's supplemental jury instruction. Because French was without counsel during a critical stage of his trial, the district court correctly granted French's petition for a writ of habeas corpus. The judgment of the U.S. District Court for the Eastern District of Michigan in case 00-2308 is AFFIRMED.

Footnotes

*The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

[1] Ty Jones is not related to Kurt Jones, the appellant in this case.

[2] There was no dispute French committed the shootings. Instead, the issue at trial was French's mental state at the time of the shootings. At trial, French presented expert testimony and other evidence to show he was legally insane on the day of the shootings because an erroneously prescribed overdose of a powerful hypertension drug had combined with a pre-existing mental disorder to make him paranoid and psychotic.

In response, the government presented expert testimony that French was legally sane on the day of the shootings.

[3] Michigan law allows a verdict of "guilty but mentally ill." *See* Mich Comp. Laws §§ 768.36. To return such a verdict, a jury must find the following beyond a reasonable doubt: (1) the defendant is guilty of an offense; (2) the defendant was mentally ill at the time of the offense; (3) the defendant was not legally insane at the time of the offense. *See* Mich Comp. Laws §§ 768.36(1). A person found guilty but mentally ill is sentenced the same as if he were simply found guilty of the offense. Mich. Comp. Laws §§ 768.36(3). The only difference between the two verdicts is that the department of corrections is responsible for evaluating the defendant and providing any required psychiatric treatment. *See id.*

[4] The relevant part of the trial judge's third instruction to the jury is as follows:

> THE COURT: Now, ladies and gentlemen, I must remind you that you did take an oath to render a true and just verdict. But if you are to be expected to render a verdict, you must communicate, and you must talk with each other.
>
> This case lasted how many days, Mr. Hutting? Approximately 16 days?
>
> MR. HUTTING: Fourteen days trial. For jury selection -
>
> THE COURT: All right. So it wouldn't be uncommon for deliberations to go on for some time, and I might remind you that you began to deliberate I think Friday, and I don't know how you can come to the conclusion that you are not going to reach a verdict.
>
> Based upon your oath that you would reach a true and just verdict, we expect you will communicate. As I

stated before, exchange ideas. Give your views. Give your opinions and try to come to a verdict. if at all possible.

But if you don't communicate, you know that you can't reach a verdict. And when you took the oath, that was one of the promises that you made by raising your hand taking the oath, that you would deliberate upon a verdict, to try to reach a verdict. And we told you at the outset it would not be an easy task, but we know that you can rise to the occasion.

So we'll ask that you return to the jury room.

Thank you.

(J.A. at 84-85).

[5] We decide this case under the AEDPA because French filed his petition for a writ of habeas corpus in October 1998, well after AEDPA's effective date of April 24, 1996. *See Barker v. Yukins*, 199 F.3d 867, 871 (6th Cir. 1999).

[6] The appellant says the following cases describe structural errors because they involve the total deprivation of counsel: *Geders v. United States*, 425 U.S. 80 (1976) (a trial court's order preventing a defendant from consulting with his attorney at all during a recess between his direct and cross-examination); *Herring v. New York*, 422 U.S. 853 (1975) (the trial court's refusal to allow counsel to be heard in summation of the evidence); *Brooks v. Tennessee*, 406 U.S. 605 (1972) (a statute requiring a defendant to testify before any other defense evidence was presented deprived the defendant of the advice of counsel in making the decision); *White v. Maryland*, 373 U.S. 59 (1963) (the denial of counsel at a preliminary hearing where a plea was entered); *Gideon v Wainright*, 372 U.S. 335 (1963) (total deprivation of the right to counsel during trial); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (the

denial of counsel at arraignment, the stage at which insanity must be pleaded or the defense forfeited); *Ferguson v. Georgia*, 365 U.S. 570 (1961) (a statute permitting the admission only of the defendant's unsworn statement and the denial of the right to have counsel examine the defendant regarding it); *Williams v. Kaiser*, 323 U.S. 471 (1945) (the refusal to appoint counsel before entry of the defendant's plea).

[7] *Sullivan* held that "any substantial departure" from ABA standard instruction 5.4 would be grounds for reversible error. *Sullivan*, 392 Mich. at 342, 220 N.W.2d at 450. In *People v. Hardin*, 421 Mich. 296, 365 N.W.2d 101 (1984), the Michigan Supreme Court held that substantial deviation from ABA standard jury instruction 5.4 only warranted reversal if the given instruction was unduly coercive. *Hardin*, 421 Mich. at 314-15, 365 N.W.2d at 109. In deciding if an instruction was unduly coercive, a court considers (1) whether the instruction can cause a juror to abandon his conscientious dissent and defer to the majority in order to reach an agreement; (2) whether the trial court required, or threatened to require, the jury to deliberate for an unreasonable length of time or for unreasonable intervals; or (3) whether the instructions call for the jury to exercise its civic duty in reaching a unanimous verdict contains the message that their failure to reach a verdict is a failure of the jury's purpose. *Id.* at 316, 365 N.W.2d at 110.

APPENDIX C

United States District Court.
E.D. Michigan.
Southern Division.

Oliver FRENCH, Jr.,
Petitioner,

v.
Kurt JONES,
Respondent.

Civil No. 98-CV-74520-DT
Sept. 29, 2000.

Following remand in habeas proceeding, 2000 WL 1033021, the District Court, Tarnow, J., held that defendant's right to counsel was violated, requiring automatic reversal of his conviction, where judge, without defendant's counsel present, gave a supplemental jury instruction to a jury that had indicated three times that it was unable to reach a verdict.

Application conditionally granted.

David A. Moran,
Special Asst. Appellate Defender
Detroit MI,
for Petitioner.

Olga Agnello-Raspa,
Detroit, MI
for Respondent.

OPINION AND ORDER GRANTING THE PETITION FOR WRIT OF HABEAS CORPUS FOLLOWING REMAND FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. [FN1]

FN1. Staff Attorney Daniel Besser provided quality research assistance.

TARNOW, District Judge.

This matter is before the Court following a remand from the United States Court of Appeals for the Sixth Circuit. On March 25, 1999, the Court granted petitioner a writ of habeas corpus, on the basis that the state trial court gave the jury a supplemental instruction while petitioner's counsel was absent. *French v. Jones,* 41 F.Supp.2d 726 (E.D.Mich.1999). In so ruling, the Court noted that the petitioner had established that he was deprived of the right to the assistance of counsel during a critical stage of the trial, namely, the trial court's re-instruction of a jury that had on three separate occasions indicated to the court that it was hopelessly deadlocked. The Court concluded that because petitioner was deprived of the assistance of counsel during a critical stage of the proceedings, reversal of his conviction was automatic. *Id.* at 733-735.

The respondent appealed the Court's decision to the United States Court of Appeals for the Sixth Circuit. Although the Sixth Circuit agreed with this Court's statement of the law, the Court of Appeals was unable to determine whether petitioner was truly without counsel at the time of the trial court's supplemental jury instruction. The Sixth Circuit remanded the matter back to this Court for an evidentiary hearing for the purpose of determining the precise role that Mr. Ty Jones played in petitioner's defense. *French v. Jones,* 225 F.3d 658, 2000 WL 1033021(6th Cir. July 18, 2000). On August 31, and September 7, 2000, an evidentiary hearing was conducted before this Court. For the reasons stated below, petitioner's application for writ of habeas corpus is again **GRANTED**.

*640 I. *The Evidentiary Hearing*

Pursuant to the Sixth Circuit's remand order, the Court conducted an evidentiary hearing to determine what role, if

any. Ty Jones played in petitioner's defense at trial. The Sixth Circuit, as well as respondent, both agreed that neither of petitioner's two attorneys of record, Cornelius Pitts or Monsey Wilson, were present in the courtroom when the trial court reinstructed the jury. Prior to the hearing, both this Court and the Sixth Circuit were of the impression that Mr. Jones was an attorney who had been licensed to practice in California, but had not been admitted to practice law in Michigan, either in general or *pro hac vice* for this case.

Ty Jones was the first witness to testify. Mr. Jones testified that he was a motion picture consultant and screenwriter who had known lead counsel Cornelius Pitts for ten years. According to Mr. Jones, Mr. Pitts was interested in the motion picture business and the two men had discussed Mr. Pitts' cases in the past, possibly for a film project. At the time of petitioner's trial, Mr. Jones was engaged in a project concerning the Detroit criminal justice system entitled "1300 Beaubien". [FN2] Mr. Jones wanted a 'birdseye view' of a high profile criminal case in Detroit and asked Mr. Pitts if he could sit 'sidesaddle' with Mr. Pitts to get a close view of a criminal case. Mr. Pitts agreed to his request and Mr. Jones sat at counsel table during trial. According to Mr. Jones, however, Mr. Pitts did not have him do anything and he was simply there to observe. Mr. Jones did acknowledge that during the jury *voir dire*, Mr. Pitts had him write down the names of prospective jurors so that Mr. Pitts could address them by name while questioning them. Mr. Jones attended every day of the trial and was present for deliberations.

> FN2. This is the address of the Detroit Police headquarters.

Contrary to what both this Court and the Sixth Circuit assumed, Mr. Jones is not an attorney. Mr. Jones is not licensed to practice law nor does he possess a law degree. Mr. Jones attended less than one year of law school at New

York University Law School, but never graduated. Mr. Jones denied telling Mr. Pitts, petitioner, or any of the other participants that he was an attorney and he never questioned any witnesses or filed any motions in this case. Specifically, Mr. Jones knew nothing of either federal or Michigan law concerning jury instructions. Mr. Jones did not make any objections or comments to the instruction as given by the trial court nor did he even put his name on the record prior to the jury being reinstructed by the judge.

Monsey Wilson was one of the two attorneys of record who represented petitioner in this case. Mr. Wilson testified that Mr. Pitts was the principal attorney in this case and made the decisions concerning Mr. Jones' participation in the case. Mr. Wilson admitted that Mr. Pitts introduced Mr. Jones at the beginning of trial as counsel from California, but indicated that it was his understanding that Mr. Jones was not representing petitioner. It was Mr. Wilson's belief that Mr. Jones was merely there to assist with whatever Mr. Pitts wanted him [Jones] to do. Mr. Wilson didn't know whether Mr. Jones was, in fact, an attorney, but acknowledged that no one ever moved to have Mr. Jones admitted to practice law *pro hac vice* in this case. Mr. Wilson admitted that he was not present when the trial court read the supplemental jury instruction to the jury.

Cornelius Pitts also testified at the hearing. He indicated that he and Mr. Wilson were the only attorneys of record. Mr. Pitts knew Ty Jones, although not for as long as Mr. Jones claimed that the two men had been acquainted. Mr. Pitts thought that Mr. Jones was an attorney but never checked his credentials. Mr. Pitts further claimed that Mr. Jones had told him that he was a practicing attorney. Mr. Pitts emphasized that he did not plan on using Mr. Jones as a lawyer in the case. Mr. Jones never filed an appearance, nor ***641** did Mr. Pitts move to have Mr. Jones admitted to practice *pro hac vice*. Mr. Pitts never told petitioner that Mr.

Jones was representing him. According to Mr. Pitts, Mr. Jones was supposed to be a 'gofer' for the defense team.

On cross-examination, Mr. Pitts admitted that he had introduced Mr. Jones at the beginning of trial as counsel, but explained that he did this solely to give the jury the impression that petitioner had a defense team representing him. At sentencing, Mr. Pitts had told the trial judge that Mr. Jones had been admitted to practice law in California, but admitted now that this was an erroneous statement.

Augustus Hutting, the trial prosecutor, was also called to testify. Mr. Hutting testified that Mr. Pitts and Mr. Wilson initially were the only trial counsel for petitioner. On the first day of trial, Mr. Pitts introduced Mr. Jones to Mr. Hutting as an attorney from California who specialized in jury selection. Mr. Hutting advised Mr. Pitts that if he wanted Mr. Jones to sit at counsel table, it would have to be approved by the trial court. Mr. Pitts, Mr. Jones. and Mr. Hutting approached the bench, where Mr. Pitts again told the trial judge that Mr. Jones was an attorney from California. Mr. Jones sat at the defense table for the entire trial.

Mr. Hutting testified that he learned about the third note from the jury on Tuesday morning. At the time, Mr. Wilson and Mr. Jones were present in the courtroom. A deputy informed the men that they had received another note and that the judge was sending the jury to lunch early. The deputy also informed the men to return to court at two o'clock, at which point the judge would address the note. When Mr. Hutting returned at two o'clock, Mr. Jones had returned to court, but neither Mr. Pitts nor Mr. Wilson were present. Shortly thereafter, the judge came out and asked where either Mr. Pitts or Mr. Wilson were. Mr. Hutting informed the court that he did not know where either lawyer was, but indicated that Mr. Wilson had been in court when they learned about the note and had been told to return to

court at two o'clock. Mr. Hutting said that the trial court never responded to Mr. Hutting's statement that Mr. Wilson had been ordered to return to court at two o'clock. Mr. Hutting further acknowledged that he had done between four and five hundred trials in Detroit Recorder's Court and had never been present when a judge instructed a jury without defense counsel being present. Finally, Mr. Hutting noted that the jury was reinstructed at 2:07 p.m., only about seven minutes after the attorneys had been told to report back to court.

II. *Discussion*

Respondent now concedes that Mr. Jones was not a licensed attorney. Respondent therefore acknowledges that petitioner was not represented by counsel when the trial court gave the jury the supplemental instruction. Respondent contends, however, that reversal of petitioner's conviction is not automatic, because the error complained of here is not a structural error, but a trial error subject to harmless error analysis. Respondent argues that the situation in the present case does not involve the denial of counsel by the trial court, but instead is more analogous to either a jury communication issue or an ineffective assistance of counsel issue. Thus, the respondent argues, a writ of habeas corpus should not issue in the absence of a finding of prejudice against petitioner. Respondent argues that this Court erred in presuming that the absence of counsel during the giving of the supplemental jury instruction was prejudicial, and urges the Court to find the error to be harmless. This Court cannot accept respondent's argument.

The U.S. Supreme Court has clearly established that the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice. *Roe v. Flores-Ortega,* 528 U.S. 470, 120 S.Ct. 1029, 1038, 145 L.Ed.2d 985 (2000); *Penson v. Ohio*, 488 U.S. 75, 88,

109 S.Ct. 346, 102 L.Ed.2d 300 (1988); *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The existence of certain structural defects in a trial, such as the deprivation of the right to counsel, requires automatic reversal of the conviction because it infects the entire trial process. *Brecht v. Abrahamson*, 507 U.S. 619, 629-630, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). The U.S. Supreme Court has routinely found constitutional error without any specific showing of prejudice to a defendant when counsel is either totally absent, or prevented from assisting the accused during a critical stage of the proceedings. *United States v. Cronic*, 466 U.S. at 659, fn. 25, 104 S.Ct. 2039; *United States v. Minsky*, 963 F.2d 870, 874 (6th Cir.1992).

The return of a supplemental jury instruction is a critical stage of the criminal proceeding. *Rushen v. Spain*, 464 U.S. 114, 119, fn. 4, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983); *Rogers v. United States*, 422 U.S. 35, 38- 40, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975);. *Curtis v. Duval*, 124 F.3d 1, 4 (1st Cir.1997). Indeed, the Sixth Circuit agreed with this Court's legal conclusion that the giving of a supplemental jury instruction is a critical stage of the proceedings. *French v. Jones*, 225 F.3d 658; 2000 WL 1033021, * 3 (6th Cir. July 18, 2000). The Sixth Circuit further noted that even the Michigan trial and appellate courts appeared to agree that this was a critical stage of the proceedings. *Id.*, 2000 WL 1033021 * 3, fn. 5.

In *Curtis v. Duval*, the First Circuit agreed with the habeas petitioner that giving a supplemental jury instruction without consulting, and in the absence of, the defendant's attorney, denied the defendant the assistance of counsel at a critical stage of the proceedings. The First Circuit noted that even though this deprivation was short-lived, it occurred "during a vital point in the trial and was, within its terms, total." The First Circuit noted that if it applied the automatic

reversal rule enunciated in *Cronic*, *Penson*, and Parent [FN3]. the Court would hold that the error required reversal. *Curtis*, 124 F.3d at 4-5. The First Circuit in *Curtis* declined under the dictates of *Teague v. Lane* to grant habeas relief to the petitioner solely because his conviction had become final in 1983, one year before *Cronic* was decided. *Id.* at 6.

> FN3. *United States v. Parent*, 954 F.2d 23 (1st Cir.1992).

In support of her argument that automatic reversal is not required in this case, respondent cites to the *Rushen* case. In *Rushen*, the U.S. Supreme Court ruled that an unrecorded *ex parte* communication between a trial judge and a juror can be harmless error. *Rushen* does not support respondent's position for several reasons. *Rushen* did not involve the trial court giving supplemental or additional jury instructions to a jury in counsel's absence. The circumstances in *Rushen* involved a juror's *ex parte* communications with the state trial judge concerning her personal acquaintance with an alleged police informant's murder victim and her fear that she might cry if the murder of her friend was explored further at trial. The trial judge told her not to be concerned and that the issue would probably not be discussed again. The judge, however, did not inform the defendants or counsel about these discussions with the juror. *Rushen v. Spain*, 464 U.S. at 115-116, 104 S.Ct. 453. On review, the U.S. Supreme Court found this *ex parte* communication between the judge and juror to be harmless error, because the murder was not related to the crimes at issue, and the communication was innocuous. Id. at 120-121, 104 S.Ct. 453.

[4] The present case does not involve the judge having an innocuous *ex parte* communication with a single juror over an issue unrelated to the case. Instead, it involves the judge, without petitioner's attorney being present, giving a supplemental jury instruction to a jury that had indicated three

times that it was unable to reach a verdict. Counsel was not given an opportunity to view the third note or to respond or object to the trial court's instruction. In *Rushen*, the U.S. Supreme Court noted that although a violation of Fed. Rule Crim.Proc. 43 may be harmless error, additional instructions from a judge to a jury, without notification to defendant or his counsel, is not. *Rushen v. Spain*, 464 U.S. at 119, fn. 4, 104 S.Ct. 453, (citing to *Rogers v. United States*, 422 U.S. 35, 38-40, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975)).

United States v. Harris, 9 F.3d 493 (6th Cir.1993), the case cited by respondent in support of her argument, is also distinguishable from the present case. In *Harris*, the Sixth Circuit ruled that although a defendant's right to be present at every stage of trial was technically violated when the district court failed to contact parties before responding to a note from the jury asking for copies of instructions read to them earlier, the error was harmless where the court did not make a substantive response to the note but, rather, perfunctorily responded by providing the jury with a complete written set of all jury instructions read by the court. *Harris*, 9 F.3d at 499.

In this case, the judge did not merely provide the jury with a written set of all of the jury instructions given previously by the court. After deliberating for parts of five days and sending out two deadlocked jury notes, the jury sent out a third note stating: "We are not able to reach a verdict. We are not going to reach a verdict." Unlike the trial court in *Harris*, the trial court gave a substantive response to the jury's third note. More importantly, the trial court did not merely instruct the jury to continue its deliberations, but gave the jury the following instruction:

> THE COURT: Now, ladies and gentlemen, I must remind you that you did take an oath to render a true and just verdict. But if you

are to be expected to render a verdict, you must communicate, and you must talk with each other. This case lasted how many days, Mr. Hutting?

MR. HUTTING [the prosecutor]: Fourteen days trial. For jury selection-

THE COURT: All right. So it wouldn't be uncommon for deliberations to go on for some time, and I might remind you that you began to deliberate I think Friday, and I don't know how you can come to the conclusion that you are not going to reach a verdict.

Based upon your oath that you would reach a true and just verdict, we expect you will communicate. As I stated before, exchange ideas. Give your views. Give your opinions and try to come to a verdict, if possible.

But if you don't communicate, you know that you can't reach a verdict. And when you took the oath, that was one of the promises that you made by raising your hand taking the oath, that you would deliberate upon a verdict, to try and reach a verdict. And we told you at the outset it would not be an easy task, but we know that you can rise to the occasion.

The giving of supplemental or additional jury instructions to a jury is a critical stage of the proceedings for which petitioner was entitled to the representation of counsel. In the present case, neither of petitioner's attorneys were present when the jury was reinstructed, nor did they have an

opportunity to respond to the jury's note. The only person present during the reinstruction of the jury by the trial court was Mr. Jones, who is clearly not a licensed attorney nor a graduate of a law school.

In light of the record presented from the state trial court concerning the re- instruction of the jury by the trial court, as well as the testimony presented at the evidentiary hearing before this Court, there is no evidence to show that petitioner was represented by counsel during this critical stage in the proceedings. Because counsel was absent from this critical stage of the proceedings, habeas corpus relief is required.

III. *ORDER*

IT IS HEREBY ORDERED THAT PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS IS CONDITIONALLY GRANTED. UNLESS THE STATE TAKES ACTION TO AFFORD PETITIONER A NEW TRIAL WITHIN NINETY (90) DAYS OF THE DATE OF THIS OPINION, HE MAY APPLY FOR A WRIT ORDERING RESPONDENT TO RELEASE HIM FROM CUSTODY FORTHWITH.

APPENDIX D

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

OLIVER FRENCH, JR.

Defendant-Appellant.

Unpublished
July 15, 1997

No. 186834
Detroit Recorder's Ct.
LC No. 94-010499

Before: White, P.J., and Cavanagh and J.B. Bruff*, JJ.

PER CURIAM.

A jury found defendant guilty but mentally ill of first-degree murder, MCL 750.316; MSA 28.548, second-degree murder, MCL 750.317; MSA 28.549, assault with intent to commit murder (two counts), MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment without parole for the first-degree murder conviction, fifteen to thirty years' imprisonment for each of the second-degree murder and assault with intent to murder convictions, and two years; consecutive imprisonment for the felony-firearm conviction. On appeal, defendant challenges the trial court's giving a supplemental deadlock instruction to the jury to continue deliberations, in defense counsel's absence, as violative of his Sixth Amendment right to counsel and MCR 6.414, and also argues that the instruction substantially departed from ABA standard jury

instruction 5.4 and was coercive. Additionally, he challenges limitations placed on jury voir dire. We affirm.

I

After a fourteen day trial, the jury began deliberating on the afternoon on April 27, 1995. The jury was instructed to choose a foreperson and, about ten minutes late, the jury was dismissed until the next morning.

On April 28, 1995 the jury began deliberating around 9:15 a.m.* At about 2:58 p.m. that afternoon, the jury sent out the first of three notes indicating it was deadlocked. The first note stated "We can't reach a unanimous decision. Our minds are set." The jury was brought into the courtroom at 3:25 p.m, and the court stated that it had received the note, but that it was adjourning for the day and weekend.

On the morning of Monday, May 1, outside the jury's presence, the court informed counsel that it was going to read the deadlocked jury instruction to the jury because "[T]hey have not deliberated long enough in my mind." The following colloquy ensued:

> MR. HUTTING [prosecutor]: I have no objection to that, Judge. I think that we have spent by my count 13 trial days trying this case. That's from opening statement to final argument. We spent another four trial days seeking to pick a jury, picking the jury. So that's 17 actual trial or working days.
>
> And in a case of that long [six], obviously one day of deliberation is nowhere near sufficient, and I think that we should indicate that to the jury, and whatever can be done to help them reach a verdict or assist them, we are here to do that.

---

*Circuit judge, sitting on the Court of Appeals by assignment.

THE COURT: All right.

MR. PITTS [defense counsel]: My position, Judge, is that in light of the note, the definitive nature of the note, it doesn't appear to me that we have to be conscious of running a forced verdict type concept on the jury. That is, this type of deadlock jury instruction I guess it is similar to the Allen Charge that I heard sometime before, is one that seems to coerce a jury, and I am not too sure that is what we want to do.

I agree that not a lot of time has elapsed since the time the deliberations began, but by the same token the definitive nature of the note seems to say that it doesn't matter how much time we allowed, it doesn't matter indeed what instruction is given, our minds are made up, and not we are unable or looks like we are unable, we are definitely of the opinion we can't reach a verdict.

So my position is that I would object to the instruction, and I think that as difficult as it might be, that a mistrial would be in order.

THE COURT: Thank you, counsel. But in view of the fact that basically we have had 16 or 17, 18 perhaps working days in this trial, I think it would be unrealistic to think that the jury would deliberate and come back with verdict in a day's time.

So, I am of the opinion that we should give this instruction and hopefully their minds are

not set, and we don't force them to do anything. But I don't think they have had enough time to discuss the case.
So I will bring the jury out.

The jury was brought into courtroom at 9:30 a.m. and instructed as follows:

THE COURT: Good morning. I do trust you had a good weekend.

Okay. Ladies and gentlemen, we did receive your note Friday afternoon stating,

"We can't reach a unanimous decision. Our minds are set."

And I just called you out to indicate as you probably know we have been in a trial in this matter at least 13 or 14 days. We took a few days to select a jury. And this Court [is] of the opinion that you may still reach a verdict, but I don't think you have had enough time to deliberate adequately or to adequately deliberate I should say.

I'm going to read an instruction to you, and hopefully you will pay careful attention to it and try to make application to it before you are convinced that you your minds are set.

Ladies and gentlemen, it is your duty to consult with your fellow jurors and try to reach agreement if you can do so without violating your own judgment.

To return a verdict you must, as you know, all agree, and the verdict must represent the judgment of each of you. As you deliberate, you should carefully and seriously consider the views of your fellow jurors. You should talk things over in a spirit of fairness and frankness.

As we understand, and it is natural that there will be differences of opinion. But you should each not only express your opinion. And by reasoning the matter out jurors more often than not can reach agreement.

When you continue your deliberations again, ladies and gentlemen, don't hesitate to rethink your own views and change your opinion if you decide that it was wrong. But again we're not asking that any of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching an agreement.

But again you should talk this matter over. Rethink your position. Make some adjustment if you find that your position was taken erroneously, but the most important thing, ladies and gentlemen, is to talk it over and to reason it out, and we are sure if you do this in the spirit of fairness and frankness and in an honest effort, that you really can come to a decision.

It would be far-fetched to think that you could arrive at a decision within, really within a day's deliberation because this matter has gone on for some time. But the thing is to communicate and explain ideas and give opinions for your ideas and talk about it. You can't reach a decision unless you talk about it. And as I stated before, sometimes it requires that you do rethink your position. But don't go in with your mind set. Have an open mind as you discuss things in fairness.

So again we are going to ask that you return to the jury room. Deliberate and talk, exchange ideas. Give the basis for your various ideas and opinions, and we think you will be able to reach a fair verdict.

We will ask that you retire again to the deliberation room, ladies and gentlemen, and try your best to reach a fair,

hones decision not feeling pressured or anything or that nature, but you must exchange ideas and opinions. That is all we're asking that you do.

Thank you.

The jury deliberated until about 3:20p.m. when it sent its second note that is was deadlocked. They jury was then excused for the day.

On the morning of May 2, 1995, the court indicated to the jury that it had received its note of May 1, which stated "We have followed your instructions. We are still unable tor each a decision." The court then stated:

> Well, I just want to let you know that if there is anything we can do to assist you within the, of course, rules, and the law, we will be more than happy to do that.
>
> If there are any exhibits or anything that you need, all you need to do is to ask for them. But again we just ask that you just at this time continue to communicate. Express your opinions, your views, reasons for them and just continue to deliberate and see if you reach a verdict. But you must communicate. That you must do. Okay. That's all.

An hour and a half later, at about 11:00 a.m., the jury sent out its third note regarding being deadlocked, which the court took up after lunch, at a time when the prosecutor was present but defense counsel were not.

> THE COURT: I trust you had a good lunch. I did too. We received your last note that stated: "We are not able to reach a verdict.

WE are not underlined going a [sic] reach a verdict."

That was approximately 11 o'clock this morning. Then we sent you to lunch to give you an opportunity to just kind of toss it around individually in your minds, and then we got you back this afternoon after lunch. Now, ladies and gentlemen, I must remind you that you did take an oath to render a true and just verdict. But if you are to be expected to render a verdict, you must communicate, and you must talk with each other.

This case lasted how many days, Mr. Hutting? Approximately 16 days?

MR. HUTTING: Fourteen days trials. For jury selection -

THE COURT: All right. So it wouldn't be uncommon for deliberations to go on for some time, and I might remind you that you began to deliberate I think Friday, and I don't know how you can come to the conclusion that you are not going to reach a verdict.

Based upon your oath that you would reach a true and just verdict, we expect you will communicate. As I stated before, exchange ideas. Give your views. Give your opinions and try to come to a verdict, if at all possible.

But if you don't communicate, you know that you can't reach a verdict. And when you took the oath, that was one of the promises that your made by raising your hand taking the

> oath, that you would deliberate upon a verdict, to try to reach a verdict. And we told you at the outset it would not be an easy task, but we know that you can rise to the occasion.
>
> So we'll ask that you return to the jury room. Thank you.

(Whereupon the jury leaves the courtroom at 2:10 p.m.)
The jury deliberated until 3:30 p.m. on May 2, 1995.

On May 3, 1995, defense counsel again moved for a mistrial, on the basis that the jury's three notes express definitively and emphatically that they could not reach a verdict, and that due process dictated that defendant be tried again. Defense counsel did not raise that he or co-counsel was not present when the court last instructed the jury to continue deliberating . Shortly after the court stated that is was prepared to declare a mistrial, and as counsel continued to argue, the jury came in with its verdict.

Defendant moved for a new trial before sentencing on the basis that defendant was deprived of his Sixth Amendment right to counsel when the court instructed the jury, after receiving the third note regarding being deadlocked, in defense counsel's absence, and on the basis that the instruction was coercive.

The court heard defendant's motion for new trial on the day of sentencing. The prosecutor argued that he was certain that, while neither Mr. Pitts nor Mr. Wilson were present when the court address the jury after the third note was sent out, Mr. Ty Jones had been present, and that Mr. Jones had been present throughout the jury's deliberations. Defense counsel responded by arguing that Mr. Jones was merely an investigator assisting counsel, did not file an

appearance, was licensed to practice law only in California, and never addressed the court or questioned witnesses.

The court noted that:

> The only argument that . . . has some merit is the one that pertains to . . . . . the actual representation of Mr. French by either or his lawyers.
>
> However, at this time this Court is prepared to go ahead with the sentencing, and I would deal with that issue as to the none [sic] representation by counsel of Mr. French at a period that this Court will concede would be a critical stage in these proceedings.

The court denied defendant's motion for new trial. This appeal ensued.

II

Defendant first argues that the Sixth Amendment and MCR 6.414 (A) mandate that his conviction be reversed because the trial court gave supplemental instructions to the jury and engaged in a colloquy with the prosecutor in defense counsel's absence. Defendant argues that a harmless error analysis does not apply, and even if it does, the error was not harmless. Relatedly, defendant asserts that the supplemental instruction requires reversal, in and of itself, because it substantially deviated from ABA Standard Jury Instruction 5.4.

A criminal defendant has a due process right to be present and to have counsel present at all critical stages of trial. *Rushen v Spain*, 464 US 114, 117; 78 L Ed 2d 267; 104 S Ct 453 (1983). The United States Supreme Court has

"uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v Cronic*, 466 US 648, 659 n25; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Jury deliberations and the return of the verdict constitute critical stages of a criminal trial for purposes of the Sixth Amendment, although counsel's absence does not require automatic reversal. *Siversion v O'Leary,* 764 F2d 1208, 1217 (CA 7, 1985).

It is well-settled that once the jury has begun to deliberate, counsel must be given an opportunity to be heard before the trial court responds to any juror inquiry. *United States v Smith*, 31 F 3d 469, 471 (CA 7, 1994) (citing *Rogers v United States*, 422 US 35; 95 S Ct 2091; 45 L Ed 2d 1 (1975)). Communications with a deliberating jury outside the presence of the counsel are prohibited. *People v Wytcherly*, 172 Mich App 213, 217-218; 431 NW2d 463 (1988), on reh'g 176 Mich App 714 (1989); MCR 6.414. However, automatic reversal does not necessarily follow. *People v France*, 436 Mich 138, 142-143; 461 NW2d 621 (1990). It is incumbent on a reviewing court to first categorize the communication that is the basis of the appeal as either substantive, administrative, or housekeeping. *Id.* Administrative communications include instructions that encourage a jury to continue its deliberations, and carry no presumption of prejudice. Upon an objection, the burden of persuasion lies with the nonobjecting party to reviewing court, upon its own volition, may find that an instruction which encourages a jury to continue its deliberations was prejudical to the defendant because it violated ABA Standard Jury Instruction 5.4(b). *Id.* At 143-144, 163-164. In the instant case, applying this analysis, we conclude that while defendant's Sixth Amendment right was violated, reversal is not required..

In *People v Sullivan,* 392 Mich 324, 341-342 (1974), the Michigan Supreme Court adopted the American Bar

Association's Minimum Standard for Criminal Justice 5/4 as the instruction that should be read to juries that are deadlocked. The most recent version of the ABA instruction was quoted in *People v Pollick*, 448 Mich 376, 381-382; 531 NW2d 159 (1995), and is as follows:

> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
>
> (i) that in order to return a verdict, each juror must agree thereto.
>
> (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can e done without violence to individual judgment;
>
> (iii) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;
>
> (iv) that in the course of deliberations, a juror should not hesitate to re-examine his or her own views and change an opinion if the juror convinces it is erroneous; and
>
> (v) that no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations

> and may give or repeat an instruction as provided in paragraph (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> (c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

CJI2d 3.12 is based upon the ABA model instruction.

Any substantial departure from the ABA instruction is reversible error. *Pollick, supra* at 382. However, the test for determining whether an instruction substantially departs from the ABA standard is whether the instruction is unduly coercive, not whether the words used match the words of the ABA standard:

> The significance of a 'substantial departure' is the risk that the resultant instruction will be more coercive than the ABA instruction. The test for determining whether a departure from ABA standard 5.4 is substantial cannot rest simply on a gross difference in language. The instruction that departs from ABA standard 5.4 must also have an undue tendency of coercion - e.g., could the instruction given cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement? [*People v Hardin*, 421 Mich 314; 365 NW2d 101 (1984).]

The instruction should be examined in the factual context in which it was given. *Pollick, supra* at 384.

> Also relevant is whether the court required, or threatened to require, the jury to deliberate for an unreasonable length of time or for unreasonable intervals... In addition, as we noted in *People v Goldsmith* [411 Mich 555; 309 NW2d 182 (1981)], a case concerning a *Sullivan* instruction given as part of the main charge to the jury, an instruction that calls for the jury, as part of its civic duty, to reach a unanimous verdict and which contains the message that the failure to reach a verdict constitutes a failure or purpose, is a substantial departure, but the reason it is, is because it tends to be coercive. [*Pollick*, 448 Mich at 3840385, quoting *Hardin*, 421 Mich at 316.]

"The optimum instruction will generate discussion directed towards the resolution of the case but will avoid forcing a decision." *Sullivan*, 392 Mich at 334.

In the case at bar, the trial court gave the instruction at issue after the jury had been deliberating for its third (April 28, May 1 and May 2). Thus, this is unlike the situation in *Pollick*, *supra*, where the jury had not yet begun to deliberate. Instructions given to a jury that has not yet begun to deliberate are less likely to weigh on dissenting jurors or to be interpreted as a request for the jurors to abandon their views for the sake of reaching a verdict. *Pollick, supra* at 385. However, this does not alone render the instruction coercive. *Hardin, supra*.

The trial court's instructions must be read as whole. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). The trial court gave the standard jury instruction on deliberating before the jury began its deliberations. The court then instructed the jury consistent with the ABA model instruction and CJI2d 3.12 after the jury sent out its first note. Thus, the jury was well instructed on the deliberative process

and was reminded, even after first declaring itself deadlocked. that no jury member should surrender his or her hones conviction solely for the purpose of returning a verdict. While the court's last instruction did not remind the jury of this point, it did not negate the point either. The court's supplemental instruction focused on deliberation and the need for discussion and communication. It told the jury that it had an obligation to communicate, not that it had an obligation to render a verdict. The court spoke of "try[ing] to come to a verdict" and of a promise to "deliberate upon a verdict, to try to reach a verdict." There was no plea to the juror's civic duty or threat to require the jurors to deliberate indefinitely. The trial court's comments regarding the jurors' oath to return a verdict did not unduly emphasize the need to reach a verdict, but, rather, focused on the need to communicate with one another to try to reach a verdict, if possible. Further, the jury did not respond to the instruction by rendering a verdict immediately, or before retiring for the day. Rather, the jury resumed deliberations,, deliberating for an hour and twenty minutes that afternoon, and 2 ½ to three hours the following morning, eventually rendering a verdict.

While the court did not follow the ABA standard instruction in its third instruction to the jury, this along is not basis for reversal. *Hardin, supra*. The court's supplemental instruction did not threaten the jurors into giving up their honest convictions, or imply that a juror should give up his or her views in order to reach a verdict. While we caution against departure from the ABA standard instruction and urge the trial court to measure any supplemental instructions against that standard before instructing the jury, we conclude that the overall effect of the court's supplemental instruction in this case was to focus on the obligation to communicate and that the instruction was not coercive.

III

Defendant next argues that the trial court refused to let defense counsel ask prospective jurors probing questions concerning their attitudes about race and thereby deprived defendant of a fair trial. We disagree. During voir dire, racial prejudice was a theme both sides explored because the victims were white and defendant is African-American. While the prosecutor only briefly mentioned this fact, defense counsel asked numerous questions and addressed the jury on this topic many times. Defense counsel posed two questions that the trial court disallowed following the prosecutor's objection. The first question had to do with the jurors' views on affirmative action, and the second question was whether a white juror would allow his daughter to marry a black man. The trial court restricted the questioning to more objective areas, such as whether the jurors socialized with those of other races and the racial composition of their neighborhoods. We conclude that in light of the extensive voir dire, defendant's inability to pursue these two questions did not deprive him of an opportunity to explore the prospective juror's racial attitudes and did not deprive him of a fair trial.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ John B. Bruff

At 10:25 a.m. the jury sent out a note requesting the curriculum vitaes and reports of the doctors that testified, copy of the transcript, and guidelines and definitions of possible verdicts. At 10:56 a.m., the jury was read the elements of the charges and counts, and the definitions of mental illness, mental retardation and legal insanity. The jury returned to deliberate at 11:15 a.m. and later that afternoon (time not indicated in transcript) sent out another note, which stated:

> Please, we respectfully request a copy of the elements of first degree and second degree

> murder. Definition of mental illness, legal insanity. We would like to have a copy, not to rely on memory. If we cannot have a copy, just tell us no. Please do not brings [sic] us out again.

The court sent the jury written instructions, and deliberations continued..

The sentencing transcript indicates that the court made this argument, but it appears from the context that the prosecutor made these remarks.

APPENDIX E

United States Court of Appeals.
First Circuit.

Manuel GONZALEZ-GONZALEZ, Petitioner, Putative Appellant.
v.
UNITED STATES, Respondent, Putative Appellee.

No. 02-1243.

Oct. 29, 2002.

Following affirmance of his convictions for drug conspiracy and money laundering offenses, federal prisoner moved to vacate, set aside, or correct sentence. The United States District Court for the District of Puerto Rico, Juan M. Perez-Gimenez, J., denied motion, and prisoner moved for certificate of appealability. The Court of Appeals, Selya, Circuit Judge, held that: (1) prisoner was not denied effective assistance of counsel; (2) trial court's failure to inform counsel about jury notes during deliberations did not warrant reversal; and (3) failure to submit issue of drug quantity to jury was harmless error.

Motion denied.

***322** Appeal from the United States District Court for the District of Puerto Rico, Juan M. Pérez-Giménez, U.S. District Judge.

Judith H. Mizner, on motion for issuance of certificate of appealability, for putative appellant.

Before BOUDIN, Chief Judge, SELYA and LIPEZ, Circuit Judges.

SELYA, Circuit Judge.

**1 The petitioner, Manuel Gonzalez-Gonzalez, moves for a certificate of appealability, 28 U.S.C. § 2253, alleging ineffective assistance *323 of appellate and trial counsel. We recite only the facts necessary to limn the petitioner's claims. We refer readers who hunger for more exegetic detail to our opinion on direct appeal. *See United States v. Gonzalez-Gonzalez*, 136 F.3d 6 (1st Cir.), *cert. denied*, 524 U.S. 910, 118 S.Ct. 2074, 141 L.Ed.2d 150 (1998)

[1] The petitioner's principal claim is that his appellate counsel blundered by failing to argue that he (the petitioner) had been deprived of his Sixth Amendment right to represent himself. The record, however, shows that the district court correctly denied the petitioner's request for self-representation because the petitioner did not unequivocally waive his right to counsel. *See United States v. Betancourt-Arretuche*, 933 F.2d 89, 92 (1st Cir.1991) (honoring "every reasonable presumption against waiver of the right to counsel") (citation and internal quotation marks omitted). With his counseled motion for hybrid representation still pending, the petitioner submitted a pro se motion stating that he "*remains* in his position of requesting from the Court his pro se representation with the assistance of his attorney ... as standby counsel." (emphasis supplied). The unavoidable conclusion, reinforced by the lengthy colloquy during the second day of trial, is that the petitioner was not asserting his right to represent himself, but, rather, was renewing his request for hybrid representation. Accordingly, appellate counsel was not ineffective for declining to raise the issue of self- representation.

We are somewhat more troubled by the claim that trial error occurred during jury deliberations--error to which trial counsel's lethargy allegedly contributed and about which appellate counsel neglected to complain. We set the stage.

The preferred practice in this circuit is that "messages from a deliberating jury, pertaining to ongoing deliberations, ought to be fully disclosed to the lawyers when received, so that the latter may be heard before the judge implements a course of action." *United States v. Parent*, 954 F.2d 23, 25 (1st Cir.1992). According to the petitioner's unsworn memorandum, [FN1] the district court, without notifying either counsel, granted the jury's request for transcripts of the testimony of two government witnesses. The court then issued a written supplemental instruction in response to a jury note without involving counsel in the process. In substance, the instruction reminded the jury that it had a duty to determine the guilt or innocence of the defendant from the evidence in the case, and that the verdict must be unanimous as to each count of the indictment.

> FN1. The sworn petition alleges only that the court "decid[ed] jury notes out of presence of defendant."

[2] In the ordinary course, a habeas application must rest on a foundation of factual allegations presented under oath, either in a verified petition or a supporting affidavit. *See, e.g.*, Rule 2, Rules Governing Section 2255 Proceedings, 28 U.S.C. § 2255. Facts alluded to in an unsworn memorandum are not sufficient. *See Barrett v. United States*, 965 F.2d 1184, 1195 (1st Cir.1992); *Dalli v. United States*, 491 F.2d 758, 760 (2d Cir.1974). Here, moreover, even were we to accept the petitioner's unsworn allegations as true, they would not warrant a certificate of appealability because the petitioner has identified no plausible way in which he might have been prejudiced.

**2 The rule in this circuit is that "a trial court's error in failing seasonably to inform *324 counsel about a jury note does not require reversal if the error is benign." *Parent*, 954 F.2d at 25 (citing *United States v. Maraj*, 947 F.2d 520, 526 (1st Cir.1991)); *accord United States v. Hernandez*, 146 F.3d 30, 35 (1st Cir.1998). [FN2] This comports with the authorities elsewhere. *See, e.g., United States v. Bustamante*, 805 F.2d 201, 203 (6th Cir.1986); *United States v. Widgery*, 778 F.2d 325, 329 (7th Cir.1985); *United States v. Arriagada*, 451 F.2d 487, 488 (4th Cir.1971); *Jones v. United States*, 299 F.2d 661, 662 (10th Cir.1962).

> FN2. We have yet to decide whether the appropriate test for harmlessness in this context is that set forth in *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (asking whether the error was "harmless beyond a reasonable doubt") or the more lenient inquiry delineated in *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) (asking whether "the error had substantial and injurious effect or influence" vis-à-vis the judgment). We need not make that choice today, as the petitioner falls short under either definition of harmless error.

In this instance, the supplemental instructions were correct on their face. Moreover, even though the supplemental instructions were "delivered at a critical juncture in the case," they were not "out of balance" in any material respect. *Parent*, 954 F.2d at 26. In any event, the supplemental instructions were similar to portions of the charge, given earlier, that counsel had reviewed without objections. As for the transcripts, if they were furnished to the jury at all--the court promised them only at the conclusion of its own review--it is hardly remarkable (and certainly not erroneous) for the court to have key testimony read or submitted to the jury at the jury's request. *See, e.g., United States v. Argentine*, 814

F.2d 783, 787 (1st Cir.1987). The petitioner gives us no convincing reason to think that counsel might have objected; or that, if he had objected, he could have changed the trial court's mind; or even that, had the transcripts been withheld, the verdict might have been different.

In an effort to parry this thrust, the petitioner contends that, notwithstanding the *Parent* rule, prejudice should be presumed because he was "denied counsel at a critical stage of his trial." *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (footnote omitted). Doctrinally speaking, however, prejudice per se is hen's-teeth rare. Indeed, two recent Supreme Court cases have emphasized just how unusual are the circumstances that would justify a court in forgoing particularized inquiry into whether counsel's inadequate performance undermined the reliability of a verdict. *See Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 1241, 152 L.Ed.2d 291 (2002); *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 1850-51, 152 L.Ed.2d 914 (2002). In both instances, the Court reiterated the proposition that, in the ineffective assistance context, prejudice may be presumed only in narrowly circumscribed situations. [FN3] We too have emphasized the same point. *See, e.g., Ouber v. Guarino*, 293 F.3d 19, 33 (1st Cir.2002); *Scarpa v. DuBois*, 38 F.3d 1, 12, 15 (1st Cir.1994). We are constrained by these authorities to hold that the prejudice ***325** per se doctrine does not apply in the circumstances of this case. [FN4]

> FN3. Moreover, the Supreme Court recently vacated the decision in *French v. Jones*, 282 F.3d 893, 901 (6th Cir.2002) (affirming the grant of a state prisoner's habeas petition on the ground that the state courts "unreasonably applied harmless error analysis to French's deprivation of counsel during the supplemental instruction"). The Court remanded the case "for further consideration in light of *Bell v. Cone*

[.]" *Jones v. French*, --- U.S. ----, 122 S.Ct. 2324, 153 L.Ed.2d 153 (2002) (per curiam).

FN4. Our opinion in *Curtis v. Duval*, 124 F.3d 1 (1st Cir.1997), is not to the contrary. Dictum aside, the *Curtis* court, consistent with *Bell* and *Mickens*, rejected the habeas petitioner's reliance on "*Cronic's* prejudice per se principle" and held that the petitioner was not "actually prejudiced." *Id.* at 6. We explained that the trial court's error in instructing the jury during the "transitory absence" of the petitioner's counsel "was neither substantial nor injurious," but, rather, "harmless." *Id.*

The petitioner next asserts that his various counsel should have anticipated the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and that he should be resentenced in light of that decision. Even assuming *Apprendi* applies retroactively to this case--a matter on which we take no view--any error would be harmless. *See United States v. Duarte*, 246 F.3d 56, 61-62 (1st Cir.2001) (applying harmless error analysis to assertion of *Apprendi* error).

**3 [3] Here, the evidence overwhelmingly establishes the minimum drug quantity needed to justify the sentence actually imposed. The government's "very strong case against Gonzalez" included the physical seizure of 350 kilograms of cocaine, part of a "major shipment of cocaine and marijuana Gonzalez had imported from Colombia to Puerto Rico in September of 1992." *Gonzalez-Gonzalez*, 136 F.3d at 8, 10. No more is exigible to defeat an unpreserved *Apprendi* claim.

[4] The petitioner also asseverates that his trial counsel should have investigated and called three witnesses on his behalf. This asseveration is unpersuasive. There is no

indication that one witness, a convicted codefendant in a related case, made available any allegedly exculpatory information before or during the petitioner's trial. The second witness would have offered only cumulative impeachment testimony. The third might in turn have been impeached with his prior statements implicating the petitioner in several drug transactions. Under these circumstances, the petitioner cannot overcome the presumption that counsel's decision not to call these witnesses might be considered sound trial strategy. *See, e.g.*, Lema v. United States, 987 F.2d 48, 55 (1st Cir.1993) (stating that the "decision to interview potential witnesses, like the decision to present their testimony, must be evaluated in light of whatever trial strategy reasonably competent counsel devised in the context of the particular case"); *United States ex rel. Walker v. Henderson*, 492 F.2d 1311, 1314 (2d Cir.1974) (stating that "the decision to call or bypass particular witnesses is peculiarly a question of trial strategy which courts will practically never second-guess") (citation omitted).

Finally, the petitioner faults his appellate counsel for not bringing the government to account for sharp tactics. In this regard, he contends that the government improperly "highlighted" alleged code words in video transcripts that were shown to the jury, using quotation marks and contrasting typeface for emphasis. At trial, the petitioner objected to the government's playback of tape recordings on several grounds, including improper redaction, manipulation of volume, and apparent errors of transcription. Highlighting was not one of his complaints. We find the new allegation inherently improbable and contradicted by the record. Thus, we cannot say that appellate counsel was ineffective for failing to raise this claim.

***326** We need go no further. The motion for a certificate of appealability is *denied* and the appeal is *terminated.*